Supreme Court, U.S.
FILED

No.

94177 6 APR 27 1995

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1994

NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,

Petitioner,

against

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I

Whether the Federal Courts, in reviewing the assessed valuation of rail transportation property pursuant to the "4R Act"*, may proceed in disregard of the methods for valuation of specialty and railroad property established by state statute and case law.

II

Whether the Federal Courts may permit a "4R Act"* litigation to proceed as a defendant class action against local assessing and collecting municipalities in a state which utilizes "reproduction cost new less depreciation" methodologies for valuation of specialty and railroad property.

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*The "4R Act" being the designation commonly used for the Railroad Revitalization and Regulatory Reform Act of 1976, as amended, Pub. L. No. 94-210, 90 Stat. 54 (February 5, 1976).

List of Parties
(in proceedings below)

CONSOLIDATED RAIL CORP.: Plaintiff (Southern Dist. of N.Y.); Plaintiff-Appellee (Court of Appeals, 2nd Circuit).

STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK; DAVID GASKELL, in his official capacity as Executive Director of the Division of Equalization and Assessment and his successors in office: Defendants (Southern Dist. of N.Y.); Plaintiff-Appellant (Court of Appeals, 2nd Circuit).

ERIE COUNTY; CITY OF ROCHESTER; NORTH ROCKLAND SCHOOL DISTRICT: Defendants and Class Representatives (Southern District of N.Y.); Defendants-Appellants (Court of Appeals, 2nd Circuit).

TOWN OF HYDE PARK; CITY OF BINGHAMTON, VILLAGE OF CORNWALL, CITY OF BUFFALO; ONONDAGA COUNTY; RAVENA-COEYMANS-SELKIRK CENTRAL SCHOOL DISTRICT; BUFFALO CITY SCHOOL DISTRICT; ROCHESTER CITY SCHOOL DISTRICT; EAST SYRACUSE-MINOA CENTRAL SCHOOL DISTRICT; MONROE COUNTY; CHAUTAUQUA COUNTY; ORANGE COUNTY: Defendants and Class Representatives (Southern District of N.Y.).

Note: Respondent, Consolidated Rail Corporation ("Conrail") in its original complaint named the State Board of Equalization and Assessment of the State of New York ("SBEA"), David Gaskell, in

his official capacity, Erie County, Town of Hyde Park, City of Binghamton, City of Rochester, Village of Cornwall and North Rockland Central School District as defendants in their own behalf and in the alternative, as representatives of a Defendants' Class. The Federal District Court in certifying the defendants' class added nine additional class representatives but designated the SBEA and David Gaskell as individual defendants only.

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No. _____

IN THE

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OCTOBER TERM, 1994

NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, the North Rockland Central School District, petitions the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States Second Circuit Court of Appeals rendered January 31, 1995 is reported at 47 F.3d 473 and is set forth at A1. A copy of the decision of the United States District Court below is set forth at A28. The Order of the District Court granting Respondent's motion for a preliminary injunction and escrowing $11.7 million in alleged discriminatory taxes dated January 25, 1994, and the order Certifying Defendants' Class dated January 27, 1994, are set forth at A44 and A50, respectively.

Jurisdiction

The Second Circuit Court of Appeals decided this case on January 31, 1995. The Petition is filed within ninety days of that date and is thus timely. S. Ct. Rule 13.1.

This Court has jurisdiction under 28 U.S.C. Section 1254 (1).

Constitutional Provision Involved

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const. Amend. X.

Statutory Provisions Involved

49 U.S.C. Section 11503, entitled *Tax discrimination against rail transportation property*, in relevant part provides:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property. . . .
>
> Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceed by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

A copy of the entire text of 49 U.S.C. Section 11503 is set forth in the Appendix at A55.

Fed. R. Civ. P. 23 provides in relevant part:

Rule 23. *Class Actions*

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all

members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition: . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Statement of the Case

The Consolidated Rail Corporation ("Conrail"), an interstate rail and intermodal carrier, instituted suit in the United States District Court for the Southern District of New York contesting the assessed value of its rail transportation property throughout New York State. Conrail conducts its operations in fourteen different states, including

New York.[1] Subject matter jurisdiction was asserted pursuant to Section 306 ("S 306") of the Railroad Revitalization and Regulatory Reform Act of 1976, (the "4R" Act) Pub. L. No. 94-210, 90 Stat.54 (February 5, 1976) now codified at 49 U.S.C. Section 11503.

Conrail asserts that the local assessing authorities in New York have overvalued its properties for purposes of *ad valorem* taxation for the 1993 tax year. The 1993 statewide total of all local assessed valuations of Conrail's rail transportation property, with a statutory railroad ceiling or exemption in place, was $924 million. Conrail's witnesses contend that the total 1993 true market value of its rail transportation property in New York did not exceed $451 million. On this basis, Conrail alleges that 300 municipal assessing jurisdictions and 700 municipal collecting jurisdictions have proceeded in violation of Section 306.

Under the 4R Act, an assessment is a "valuation for a property tax levied by a taxing district", 49 U.S.C. section 11503 (a)(i); an "assessment jurisdiction" is a geographical area in a State in which an assessment of the value of property is determined for purposes of ad valorem taxation. 49 U.S.C. Section 11503 (a)(2).

In New York, the local assessor is charged by law with the assessment of all real property, including rail transportation property

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[1] Conrail was operated under the stewardship of the United States Department of Transportation during the period from April 1, 1976 to March 26, 1987 as a successor to the bankrupt Penn Central Railroad and other carriers pursuant to the provisions of the Regional Rail Reorganization Act of 1973 (the "3R" Act) U.S. Code Congressional and Administrative News, 1973 Vol 1, page 1102; Section 301 (a) - for profit Conrail corporation to be established under State Law. On March 26, 1987 the stock of Conrail was resold to the public through a sale of its common stock.

within the particular assessing authority or assessing jurisdiction. New York Real Property Tax Law, Section 489-cc. *Delaware and Hudson Railway Co. vs. McDonald,* 126 A.D. 2d 29 (3rd Dept. 1987), *app. dismissed.* 70 N.Y. 2d 693 (1987). A local "4R" Act violation would occur if the "ratio of assessed value to true market value" of a railroad's transportation property as assessed in any particular "assessment jurisdiction" exceeds the "ratio of assessed value of all other commercial and industrial property to the true value of all other commercial and industrial property" by a disparity in excess of 5%.

New York State has established a statutory regimen, sometimes called the "Purcell Act" after its draftsman, which includes an exemption in the form of a "railroad ceiling", concerning the assessment and ad valorem taxation of interstate rail transportation property. New York Real Property Tax Law, Section 489-aa, *et seq.*; Laws of 1961, Chapter 199; Laws of 1977, Chapter 920. This statute contains express legislative declarations, determined in 1977, to the effect that "railroad ceilings cannot be established for the new systems without the expenditure of large sums of money to obtain cost data on system railroad property located outside the State." (Note that *Conrail would be such a new system under its Federal reorganization.)* [2] On the basis of that finding and as a keystone of its statutory exemption program, the Legislature directed that rail transportation property be valued for purposes of establishing railroad ceilings and related economic factors using "reproduction cost new less depreciation" ("RCNLD") methodology. New York Real Property Tax Law, Sections 489-ee and Section 489-ii. RCNLD has been judicially applied in New York State to railroads as the prescribed method for real property tax assessment since 1897; the RCNLD approach was

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[2] *Id.*

initially imposed by the New York Court of Appeals in an 1897 case in which the local assessors use of a unit valuation approach, as now relied upon by plaintiff's experts, was repudiated. *People Ex. Rel Delaware Lackawanna and Western R.R. Co. v. Clapp,* 152 N.Y. 490 (1897).

In the instant suit, Conrail's experts criticized and rejected the State-selected replacement cost methodology; they assert that alternative unit valuation methodologies, specifically including "income capitalization" and "stock and debt" approaches must be applied instead. By using income capitalization methods, Conrail's chief witness calculates a total value for the entire Conrail system operating in 14 states at $2,350,000,000. The same witness, using a stock and debt method, calculates a total value of the entire Conrail system at $4,960,066,000. This witness argues that both his income capitalization method and the stock and debt approach establish "true market value." In reaching his ultimate valuation, however, he takes an average of these two methods as the "true value" of Conrail's rail transportation property and testifies that system wide the market value is $4,043,739,000. An allocation of this system wide value is then attributed to the property of the railroad located within New York State.

Conrail did not submit any evidence whatsoever concerning the value of its rail transportation property using the "reproduction cost new less depreciation" methods which the New York Legislature has incorporated into its statute and which the New York courts have prescribed. Conrail's expert did submit a "modified replacement cost" appraisal, which did not examine any specific inventory of Conrail's rail transportation property as located in any New York municipality or assessing jurisdiction.

The District Court, utilizing these unit methods of valuation not recognized by the state assessing authorities, determined that there

was a reasonable likelihood that a "4R" violation was present and granted a preliminary injunction directing that certain municipal taxes in dispute for the 1993 year in the sum of $11.7 million be paid in escrow into the Court register.[3] The only other proof submitted was Conrail's description of increases in taxes which resulted in part from the expiration of a second New York exemption for interstate railroads, the service enhancement program.[4] The District Court also determined that the matter should proceed as a defendant's class action, with certain local municipal entities serving as representative defendants, pursuant to Federal Rules of Civil Practice Rule 23 (b). Appendix at A50-A54.

The United States Court of Appeals for the Second Circuit affirmed the determination of the District Court and expressly rejected the decision of the Court of Appeals for the Fourth Circuit, rendered in *Chesapeake Western Ry. v. Forst,* 938 F2d 528 (6th Cir. 1991), which had held that the 4R Act, "simply does not authorize the judiciary to enter into the difficult task of second-guessing a state's policy assessment of how best to value property". After rejecting the Fourth Circuit's position, the Second Circuit also affirmed the decision of the District Court to treat the matter as a defendant's class action under Federal Rules of Civil Practice Rule 23 (b), holding in part, "it would

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[3] In addition, disputed school taxes in the statewide total sum of approximately $4.7 million dollars were paid by Conrail under protest and subject to the final determination of the Federal courts in this proceeding.

[4] The "service enhancement" program as established by the New York Legislature expired by its terms on March 1, 1993. (New York Real Property Tax Law, Section 489-hh, 1987 Laws, Chapter 1199, Section 11). The expiration of the "service enhancement" program is not an issue before this court although the occurrence may well have been a catalyst to the institution of the instant proceeding by Conrail.

be in the interest of judicial economy to litigate in one forum the narrow issue of the *proper method of determining true market value." Consolidated Rail Corporation v. Town of Hyde Park*, 47 F.3d 473, 1994 U.S. App. Lexis 2150 at 34-35 (2d Cir. 1995) (emphasis added); Appendix at A27.

REASONS FOR GRANTING THE WRIT

I

It is improper for the federal courts to proceed on issues of valuation in a 4R Act proceeding in disregard of the methods for valuation of specialty and railroad property established by state statute and case law

In *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987), this Court unanimously determined that Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. Section 11503, [5] permits federal courts to review alleged overvaluations of rail transportation property by state taxing authorities. Justice Thurgood Marshall, in the decision for the Court, ruled that the Burlington Northern Railroad Company could challenge the assessed values of the railroad in the federal courts through the "4R" Act.

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[5] 49 U.S.C. Section 11503 is a recodification of Section 306. (*See* The Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, 92 Stat. 1337.) Although the recodification altered the structure and language of Section 306, it was not intended to affect the substantive meaning of the Act. See Pub. L. No. 95-473, Section 3, 92 Stat. 1466; *Southern Ry. v. State Bd. of Equalization*, 715 F. 2d 522, 523 n.1 (11th Cir. 1983). Copies of Section 306 and 49 U.S.C. Section 11503 are reproduced in the Appendix at A55-A57 to this Petition.

In *Burlington*, Justice Marshall commented on the issue now presented in this petition by way of footnote:

> Petitioner has not challenged the valuation methodology employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the application of that methodology. . . . This case therefore does not present the question whether a railroad may, in an action under Section 11503, challenge the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied. Accordingly we express no view on that issue.

Id., at 463, n.5.

The instant case epitomizes the issue of State selected methodology as first recognized in *Burlington Northern, supra.* [6] Conrail has directly challenged, and in effect chosen to ignore, the replacement cost methodology for valuation and assessment prescribed by New York's courts, which method has also been incorporated into its railroad ceiling or exemption legislation. In the instant matter, the lower Federal courts have accepted Conrail's alternative unit approach in rendering their decisions; in addition to ignoring the State's reproduction cost new less depreciation methodology, Conrail has also failed to present any evidence of the value of its rail transportation in New York using that State selected method.

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[6] The scope and import of 4R litigation and state ad valorem taxation of railroads is emphasized by the fact that the Attorneys General for twenty five states filed briefs with the court as *amicus curiae* in *Burlington Northern R.R. Co. v. Oklahoma Tax Commission, supra.*

In New York, the local assessor in each city, town and village is charged with the assessment of all railroad real property of interstate railroad companies. New York Real Property Tax Law, Section 489-cc; *Delaware & Hudson Railway Co v. McDonald*, 126 A.D.2d 29 (3d Dept. 1987), *app. dismissed.*, 70 N.Y. 2d 693 (1987). An "assessing unit" is defined by New York statute as "a city, town or village" and "railroad real property" in general is that which is used for transportation purposes. New York Real Property Tax Law, Section 489-bb(1), (3). Under the 4R Act, an assessment is a "valuation for a property tax levied by a taxing district", 49 U.S.C. Section 11503 (a)(1); an "assessing jurisdiction" is a geographical area in a state in which an assessment of the value of property is determined for purposes of *ad valorem* taxation. 49 U.S.C. Section 11503 (a)(2).

The State of New York has selected reproduction cost methods as deserving of acceptance for the assessment of rail transportation property and for the establishment of a statutory exemption known as the "railroad ceiling" and related economic factors. There are three principal approaches to a determination of value which are in issue in this proceeding: replacement cost which includes reproduction cost, income capitalization and stock and debt [7] valuation. The income capitalization and stock and debt methods are often generally described as unit valuation methodologies. All parties agree that the use of the "RCNLD" method, the "stock and debt" method and the

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[7] A complete review of the case law (including a full Lexis search) discloses no instance in which a New York State court applied the stock and debt approach in a real property tax assessment matter; the method was expressly rejected in *Matter of Long Island Lighting Company v. Assessor of the Town of Brookhaven*, 202 A.D. 2d 32 (2d Dept. 1994).

"income capitalization method" will each result in a different conclusion as to the value of any particular asset on any given day.[8]

In New York State, specialty properties, including railroad property, utility transmission lines, utility power plants, and other unique properties have historically been valued using the replacement cost method known as "reproduction cost new less depreciation". The New York State courts have consistently held that special use properties, because of the unique purposes to which they are put, have no readily ascertainable market value and therefore are to be assessed throughout the state using reproduction cost new less depreciation. *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y. 2d 351 (1992), *reconsideration denied*, 81 N.Y.2d 784 (1993) (waste site for disposal of materials); *Matter of Brooklyn Union Gas Co. v. State Board of Equalization and Assessment*, 65 N.Y. 2d 472, 485 (1985) *cert. den.*, 475 U.S. 1082 (1986) (special franchise property consisting of underground mains, pipes, services and related measuring and regulatory equipment); *In re Rochester Urban Renewal Agency*, 45 N.Y.2d 1 (1978) (two meeting halls); *Matter of County of Suffolk (Van Bourgondien, Inc.)*, 47 N.Y.2d 507 (1979) (greenhouses) (quoting *Matter of County of Nassau (Colony Beach Club)*, 43 A.D.2d 45 (1973), *aff'd*, 39 N.Y.2d 958 (1976) (cabana and beach club)); *Matter of Federated Department Stores, Inc. v. Emil M. Podeyn, et al.*, 51 Misc. 2d 555 (1966), *aff'd*, 32 A.D. 2d 823 (2d Dept. 1969) (a large department store); *Norman's Kill Farm Diary*

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[8] In its opinion below the Second Circuit Court of Appeals noted, "the true market value of Conrail's properties hinges largely on the proper method for determining it..." *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 1994 U.S. App. Lexis 2150 (1995); Appendix at A27. In 4R Act proceedings, the issue is often the type of method the State prescribes rather than the manner in which such methods are applied. *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, 964 F.2d 548 (6th Cir. 1992).

Co., Inc. v. State of New York, 53 Misc. 2d 578 (1967) (dairy products processing plant). (See also recent analysis in *Matter of Long Island Lighting Company v. Assessor of the Town of Brookhaven*, 202 A.D.2d 32 (1994), in which a municipal assessing authority was rebuffed in its efforts to apply unit valuation methodologies, instead of RCNLD, in assessing the Shoreham nuclear power plant.)[9] This is in accord with the long line of cases based upon the decision of the New York Court of Appeals in *People ex. rel. Delaware, Lackawanna and Western R.R. Co. v. Clapp*, 152 NY 490 (1897) (railroad transportation property).[10]

The New York Legislature, in establishing a statutory regimen for partial exemptions for interstate railroads, in the form of "railroad ceilings" and "economic factors", made certain Legislative Declarations with regard to the interstate railroads in 1977. Chapter 920 of the Laws of 1977. It concluded that the "Railroad ceilings cannot be established for the new systems without the expenditure of large sums of money to obtain cost data on system railroad property located

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[9] Other states also apply replacement cost methods for special use properties including New Jersey. *Transcontinental Gas Pipeline Corporation v. Bernards Township*, 111 N.J. 507.

[10] *People ex rel. Buffalo & Lake Erie Traction Co. v. State Board of Tax Commrs.*, 209 N.Y. 502, 103 N.E. 778 (1913) (assessment of railroad viaduct); *People ex rel. New York Cent. & Hudson R.R. Co. v. Woodbury*, 153 N.Y.S. 537, 167 A.D. 428 (1915) (railroad assessment); *People ex rel. New York Cent. & Hudson R.R.Co. v. State Tax Comm.*, 205 A.D. 462, 199 N.Y.S. 820 (3d Dept. 1923), *affirmed*, 237 N.Y. 612 (1924) (assessment of railroad retaining wall and fill); *People ex rel. New York Stock Exchange Bldg. Co. v. Cantor*, 223 N.Y.S. 64, 221 A.D. 193 (1st Dept. 1927), *affirmed*, 248 N.Y. 533, 162 N.E. 514 (1928) (assessment of stock exchange building particularly suited to those purposes).

outside the State." New York Real Property Tax Law Section 489 - aa, Chapter 920 of the Laws of 1977. (To reiterate, *Conrail was such a new system under its 1976 federal reorganization.)* [11] As a result, the Legislature incorporated the RCNLD methods into the "railroad ceiling" program.

In direct contravention of the foregoing, Conrail unabashedly argues that only its unit valuation methods, which it has relied upon on an exclusive basis in this proceeding, should be accepted by the Federal Courts in their review. The unit valuation methods, as applied by Conrail, actually generate two disparate values: using an income capitalization method, Conrail sets the "true market value" of its New York rail transportation property, on an allocated basis, at $289,875,950; using a stock and debt approach, it sets the "true market value", on an allocated basis, at $611,831,424. Conrail's chief expert, Dr. Arthur Schoenwald, then averages each of these "true market valuations" to establish an ultimate true market value of Conrail's New York property, which is alleged to be not in excess of $450,853,000.[12]

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[11] See reference to Conrail corporate history and "3R" Act, *supra,* note 1.

[12] In *Union Pacific Railroad Co. v. State Tax Commission of Utah,* 716 F. Supp. 543 (D. Utah 1988) the court determined, after a five week trial involving 788 exhibits with testimony by the same railroad valuation expert, that this unit valuation approach by a railroad should be rejected.

> "The Court declines the plaintiff's invitation to adopt Dr. Schoenwald's methodology as the only correct methodology for determining true market value." *Id.* at 533.

(continued...)

Conrail's approach to the proof on true market value in this proceeding is the same system wide approach as rejected by the New York State Legislature in its legislative declarations in 1977 and as rejected by the New York's highest court since 1897. *People ex rel. v. Clapp, supra.* Using unit valuation methods, Conrail's expert has proceeded to value the entire Conrail system; then, using his own formula, he attempts to allocate a portion of that system's value to the State of New York.

If the RCNLD methods prescribed by New York State are utilized, Conrail's land and rail transportation improvements, including grading, culverts, bridges, tunnels, rail, ties, ballast and switching devices are to be physically examined and inventoried by the local assessing authority as an integral part of the assessment process. New York Real Property Tax Law, Section 489-cc; *Delaware & Hudson Railway Co. v. McDonald, supra.* In contrast to the detailed inventory that the RCNLD method requires, Conrail's chief expert testified on a "blunderbuss" basis that there are 16,500 miles of

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[12](...continued)
By footnote, the court later continued:

> [Plaintiffs] argued that their true market value should be determined by mechanically computing the average of Dr. Schoenwald's income and stock and debt indicators (ignoring the cost indicator altogether), when the disparity between Dr. Schoenwald's income and stock and debt indicators was so great as to make one or the other suspect without even comparing Dr. Schoenwald's figures with the other appraisers.

Id. at 556, n. 31.

mainline track and 24,500 miles of total track in the Conrail system as of January 1, 1993; Conrail, in its own *Fact Book* publication, states that on December 31, 1992, there were 12,400 route miles and 20,600 miles of total track. The differences between the RCNLD and the unit value approaches are remarkable. It is submitted that Conrail's unit valuation methods ("income capitalization" and "stock and debt") cannot provide local assessors with the same ascertainable local detail as the RCNLD method.

Replacement cost methods were also recently recognized and approved in the judicial review of two Interstate Commerce Commission decisions in a railroad trackage rights case, *Missouri Pacific R.R. Co. v. Interstate Commerce Commission*, 23 F.3d 531 (D.C. Cir. 1994). In that decision, Judge Ruth Bader Ginsberg found that the decision of the Interstate Commerce Commission to value certain railroad assets by the "replacement cost new less depreciation" method, instead of by other valuation methods (including possible reference to an actual recent purchase price) was not arbitrary and capricious.[13] The actual decisions of the Interstate Commerce Commission applying replacement cost, as affirmed in *Missouri Pacific, supra.*, [as found at 7 I.C.C. 2d 164 (1990) and 6 I.C.C. 2d 619 (1990)] and especially a follow-up decision on this matter located at 8 I.C.C. 2d 567 (1992), serve as important examples of the considerable detail required for proper application of a replacement cost analysis. It is a form of replacement cost methodology that has been prescribed by the New York Courts.

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[13]The Interstate Commerce Commission requires earnings for a specific line or segment of a railroad if income capitalization methods are to be applied or utilized. *Arkansas and Missouri R.R. Co. v. Missouri Pacific R.R. Co.*, 7 I.C.C. 2d 164 (1990).

As noted, the RCNLD method has been applied for assessment of special use properties, including railroads, by courts of the State of New York for a period of almost one hundred years. *Matter of Allied Corp. v. Town of Camillus, supra.; People Ex Rel. Delaware Lackawanna and Western R.R. v. Clapp, supra.* The Federal courts below, however, disregarded the state selected method and accepted Conrail's unit valuation proof.[14] The Court of Appeals for the Second Circuit compounded the error of the District Court by apparently requiring that the valuation of *all* commercial properties (not just rail transportation property) which are to be considered as part of a Section 306 proceeding, must be subjected to "the same valuation standards and methods [for] railroad property as are used in the commercial and industrial properties to which it is compared." *Consolidated Railroad v. Town of Hyde Park*, 47 F.3d 473, 1994 U.S. App. Lexis 2150 at 24-25 (2d Cir. 1995); Appendix at A20. The Court continued, "If the [4R] Act were to be interpreted, as defendants would have it, so that the SBEA [State] could adopt a special appraisal method for railroads alone, then the whole nondiscrimina-

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[14] The premise that the Federal courts should not interfere with the state's selection of a particular valuation methodology for assessment purposes may have been stated in the clearest manner in *The Federalist* No. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

> Suppose, by some forced constructions of its authority (which, indeed, cannot be easily imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State? Suppose, again, that upon the pretence of an interference with its revenues, it should undertake to abrogate a land-tax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments?

tion objective of the statute could be circumvented." *Id.* [15]

The Second Circuit also expressly rejected the decision of the Fourth Circuit in *Chesapeake Western Ry v. Forst,* 938 F.2d 528 (4th Cir.1991), in which that court viewed the method of appraisal as a matter of state policy beyond the reach of the 4R Act. *Consolidated Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 1994 U.S. App. Lexis 2150 at 24. In *Chesapeake*, the Fourth Circuit had determined that the 4R-Act:

> simply does not authorize the judiciary to enter into the difficult task of second-guessing a state's policy assessment of how best to value property. In light of Congress' expressed preference against federal interference in state taxation policy, we believe that Section 306 should be read narrowly, authorizing challenges to a state's calculations of fair market value, but not to a state's method for calculating such value. If Congress determines that one valuation method produces more accurate values than another, it may require states to utilize that accounting

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[15] The decision of the Court of Appeals for the Second Circuit in the instant matter would compel the state and its local municipalities to adopt a method of tax assessment for railroads which ignores the state's historical case law, legislative approaches, and general public policy to the effect that "RCNLD" should be applied. Since Congress has not made its intention concerning this requirement "unmistakably clear" in the language of the statute, the application of the 4R act in this manner would violate the Tenth Amendment. *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991), *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984), *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), *United States v. Bass,* 404 U.S. 336 (1971) and *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989); also citing *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985) (superseded by statute).

> method. Section 306, however, does not authorize the courts to perform the task . . . .

Id. at 533.

The Fourth Circuit subsequently applied this holding in *Richmond, Fredricksburg and Potomac R.R. Co. v. Forst*, 4 F.3d 244 (4th Cir. 1993), determining that a railroad had not improperly challenged the State's selection of a particular methodology; instead, the railroad was only challenging the application of that methodology; relying on *Chesapeake Western Ry, supra*, the Fourth Circuit allowed the railroad's complaint to stand. *See also, Burlington Northern Railroad Co v. James*, 911 F. 2d 1297 (8th Cir.1990), *Burlington Northern Railroad Co. v. Bair*, 815 F. Supp. 1223, 1228 (S. D. Iowa 1993), *reconsideration denied*, 837 F. Supp. 298 (S.D. Iowa 1993) and *Union Pacific Railroad Co. v. State Tax Commission of Utah*, 716 F. Supp. 543, 557 (D. Utah 1988). In *Union Pacific*, the court held:

> [T]his court has found nothing in the 4R Act itself or in its legislative history that requires this court to make the state apply a particular valuation methodology. Indeed, the legislative history of the 4R Act itself suggests just the opposite. . . . Thus, the legislative history suggests that the statute was not meant to dictate a state's choice of methodology, at least as long as the state's methodology has a rational basis and was not chosen for a discriminatory purpose, the court will not disturb that choice.

Id. at 552-553.

On the basis of the foregoing, it is respectfully submitted that the issue which this Court laid on the table in 1987 in *Burlington Northern Railroad Co. v. Oklahoma Tax Commission, supra*, is ready for full review and determination.

II

It is error for the federal courts to permit "4R" Act litigation to proceed against local assessing and collecting municipalities as a defendants' class action in a state which utilizes "reproduction cost new less depreciation" methodology for valuation of specialty and railroad property

Conrail moved in the Federal district court for certification of this matter as a defendant class action. After determining that it would grant a preliminary injunction, the district court made an additional determination that the matter would proceed as a defendant class action pursuant to Fed. R. Civ. P. 23(b)(3). The Court determined that the state defendants, i.e., the New York State Board of Equalization and Assessment (SBEA) and its Executive Director were not to be included as class action defendants. (Decision, Judge Charles L. Brieant, Appendix at A36). The class action defendants were to be the original named local assessing and collecting municipalities; the district court also ruled that certain additional defendants were to be added to the defendant class, i.e., the ten largest municipal recipients of Conrail real property tax revenues in the State of New York. These municipal defendants were to represent the interests of all similarly affected municipal defendants. The Court of Appeals for the Second Circuit, exercising its discretionary pendent appellate jurisdiction, affirmed the District Court below on this point. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 1994 U.S. App. Lexis 2150 at 24 (1995); Appendix at A21-A22. [16]

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[16] An order granting or denying class certification is not ordinarily appealable to the circuit court of appeals. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). However, a court of appeals that has jurisdiction over one appealable order, such as the stay of the prelimi-

(continued...)

Rule 23 contemplates the maintenance of actions against defendant classes, providing in part that "one or more members of a class may sue or be sued as representative parties..." Fed. R. Civ. P. 23 (a). There have been several cases in which defendant class actions, challenging the validity of state law, have been certified against local officials. *Hopson v. Schilling*, 418 F. Supp. 1223 (ND.Ind. 1976); *Tucker v. City of Montgomery Board of Commissioners*, 410 F. Supp. 494 (MD.Ala 1976); *Stewart v. Waller* 404 F. Supp. 206 (C.D. Miss 1975). There have also been several cases in which defendant class actions have not been recognized. *Paxman v. Campbell*, 612 F. 2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1129 (1981); *Thompson v. Board of Education*, 709 F. 2d 1200 (6th Cir. 1983); and *Henson v. East Lincoln Township*, 814 F. 2d 410 (7th Cir.), *cert. dismissed*, 122 L.Ed. 2d 111 (1993).

As in the situation with plaintiff's class actions, when a party seeks certification of a defendant class, it must establish that all of the requirements of Rule 23 (a) are present—numerosity, commonality, typicality, and adequacy of representation. In addition, a plaintiff

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[16](...continued)
nary injunction in the instant proceeding, may simultaneously exercise pendant appellate jurisdiction over an otherwise non-appealable order *(Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 698 F.2d 150, 153 (2d Cir. 1983), although acceptance of pendent jurisdiction is discretionary. *General Motors Corp. v. Gibson Chemical & Oil Corp.*, 786 F.2d 105, 108 (2d Cir. 1986). Here, the district court's order granting a preliminary injunction, which is appealable under 28 U.S.C. section 1992(a), provided the court of appeals with appellate jurisdiction; that court also had discretion under the doctrine of pendant appellate jurisdiction to review the district court's related order certifying the defendant class, and the court below chose to exercise that discretion. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 1994 U.S. App. Lexis 2150 at 24 (2d Cir. 1995); Appendix at 21.

must prove that the action fits into one of the categories enumerated in Rule 23 (b). *Ellis v. O'Hara*, 105 F.R.D. 556 (E.D.Mo.1985). The analysis which the courts employ in examining Rule 23 requirements for a defendant's class parallels those in plaintiff class action cases. *In re Gap Store Security Litigation*, 79 F.R.D. 283 (N.D. Cal. 1978).

A primary Rule 23 (a) requirement - commonality - was not satisfied in this matter; for this reason, it was error to certify the defendant class. On the issue of commonality, the actual tax assessment function in New York State is the duty of the tax assessors for three hundred separate local tax assessing units. New York Real Property Tax Law, Section 489-cc, *Delaware & Hudson Ry. Co. v. McDonald*, 126 A.D 2d 29 (3rd Dept. 1987), *app. dismissed*, 70 N.Y. 2d 693 (1987). Under New York case law, these assessors are required to assess railroad property and other specialty property, such as utilities, using the "reproduction cost new less depreciation" assessment method; this has been the case law in the State of New York since 1897. *People ex. rel. Delaware, Lackawanna and Western R.R. Co. v. Clapp*, 152 N.Y. 490 (1897); *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 357 (1992) *reconsideration denied*, 81 N.Y.2d 784 (1993); *Matter of Brooklyn Union Gas Co. v. State Board of Equalization and Assessment*, 65 N.Y. 2d 472, 485 (1985) *cert. denied*, 475 U.S. 1082 (1986); *Matter of County of Suffolk (C.J. Van Bourgondien, Inc.)*, 47 N.Y.2d 507, 511-512 (1979) (quoting *Matter of County of Nassau (Colony Beach Club)*, 43 A.D.2d 45, 49 (1973), *aff'd* 39 N.Y. 2d 958 (1976)); *Matter of Long Island Lighting Company v. Assessor of the Town of Brookhaven*, 202 A.D. 2d 32 (1994).

The New York Legislature, in establishing the statutory regimen for the ad valorem taxation of interstate railroads, recognized that such valuation is accomplished by local assessors using "reproduction cost new less depreciation" methods. New York Real Property Tax

Law, Sections 489-ee and 489-ii. It formulated a "railroad ceiling" process, in order to furnish a level of partial exemption from real property taxation for railroads. According to the statute, this ceiling and its related "economic factors" are to be calculated by the New York State Board of Equalization and Assessment (SBEA). New York Real Property Tax Law, Section 489-aa. The assessing function remains exclusively the duty of the local assessors. New York Real Property Tax Law, Section 489-cc.

On the issue of commonality, railroad transportation property in each locality is by nature distinct and different from all other localities. In some assessing municipalities, Conrail holds "state of the art" mainline trackage including recently installed welded rail and operates intermodal "double stack" trains across these lines. In other assessing areas, Conrail is in the process of reducing its railroad operations on certain lines and the actual quality of the physical plant will reflect this fact. In additional localities, there are bridges, tunnels, and railroad operating yards or terminals.[17] In the "reproduction cost new less depreciation" assessment process, a detailed inventory of the railroad's transportation property within each assessing jurisdiction is

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[17] The difficulty in allocation as a result of different traffic loads and resulting discrepancies in earning power was discussed in a New Jersey gas transmissions pipeline matter, *Transcontinental Gas Pipeline Corp. v. Bernards Township*, 111 N.J. 507 (1988). The issue of unit value allocation to particular States or to a particular local municipality becomes even more perplexing when one considers the fact that Conrail, during the periods at issue in this proceeding, could not transport "double stack" intermodal containerized shipments (two containers on top of each other on one rail freight car) through any of its primary east-west routes except those located in the State of New York. As of January 1, 1993, the valuation date in issue, Conrail was engaged in a project with the State of Pennsylvania to increase the clearance height of the tunnels and bridges located on its main east-west routes through the State of Pennsylvania.

to be prepared by the local assessor with a factor for depreciation. Each assessing jurisdiction must act independently, pursuant to statute, in making the determination as to the values of these properties. Such a local assessment process does not lend easily to judicial review on a statewide basis in the Federal Courts in a "4R" Act class action.

In *Thompson v. Board of Education*, 709 F.2d 1200, (6th Cir. 1983), the plaintiffs had attempted to establish a defendant class made up of public school teachers in five hundred separate school districts. The Sixth Circuit Court of Appeals determined that each school district had established separate policies and for this reason the commonality requirement for class certification had not been met. The same ruling should apply to the local assessing units in which individual assessors, proceeding in accordance with the requirements of New York law, determine what the proper assessments are for the real property, including rail transportation property, within their municipal boundaries.[18]

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[18] The Constitution of the State of New York, Article VIII, Section 1, provides that it is unconstitutional for a municipality to give or loan its credit to or in aid of any individual or public or private corporation or association. The individual municipalities, which are targeted as class action defendants in the instant proceeding, have no vehicle to compel the sharing or co-payment of the defense costs, including attorneys expert witness costs, from the defendants who are not named parties to this proceeding. If the action proceeded against each assessing locality, the assessor for that locality would be available for testimony and the municipal attorney would participate in that defense. In that manner, the taxpayers of a municipality named as a class action defendant would not be carrying the burden of the defense costs in this proceeding on behalf of those municipalities who have not been named as class representatives and are not making any payments towards same.

A note from the 1978 *Harvard Law Review,* is germane:

> No matter how desirable the economy in enforcement function of defendant class actions may be, though, they cannot be purchased at the expense of the fundamental unfairness to persons who are not before the court that binds them; the constitutional requirement of due process ultimately limits the scope of the defendant class action procedure. Moreover, the defendant class action device poses problems of potential unfairness to the defendant class representative who is compelled to conduct the litigation for many other defendants as well as himself.

Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 632-633 (1978)(citing *Shaffer v. Heitner,* 97 S.Ct. 2569, 2584 (1977) for the proposition that "convenience of a jurisdictional rule cannot be purchased at expense of 'the sacrifice of "fair play and substantial justice." ' ").

The opposite situation is present, however, in the instant matter where each of the 300 local assessing units has its own assessment processes, inventories to complete and depreciation schedules to establish. Rule 23 (a)(2) requires that there be "questions of law or fact common to the class". In *Kline v. Coldwell, Banker & Co.,* 508 F.2d 226, 233 (9th Cir. 1974) *cert. denied,* 421 U.S. 963 (1975) the Circuit Court upheld the District Court's refusal to certify a defendant class in an anti-trust conspiracy case because common questions did not predominate over individual questions concerning the liability of each defendant. The commonality test has also not been met in the instant proceeding by plaintiff Conrail and the Courts below should not have certified the defendant class.

With regard to "4R" Act proceedings, a diligent search discloses no holding in which a Fed.R Civ. P 23 defendant class action certification has previously been granted to any plaintiff railroad against municipal defendants in any state. Although the "4R" Act has been law since 1976, the courts below in this proceeding have for the first time allowed the application of defendant class action procedures against local assessing and collecting municipalities.

In the end, all of plaintiff's efforts in this proceeding are directed at the actions of the SBEA in setting the "railroad ceilings". The railroad ceilings are tax exemptions only; assuming arguendo that the railroad ceilings were set aside or modified by the Federal Courts, the issue of the appropriate level of assessment or valuation in each local municipality would still have to be determined on an individual basis. The only effect of the District Court's determination would be the modification or elimination of the railroad ceiling. The decision would certainly not obviate the need for review of individual assessed valuations in each locality;[19] this is exemplified by the fact that the State defendants, the SBEA and its Executive Director, were not even included as class action defendants. Opinion of Judge Charles L. Brieant, Appendix at 36.

On the basis of the foregoing, it is respectfully submitted that the issue of whether local assessing and collecting municipalities should be designated as Fed. R. Civ. P. 23(b) (3) class action defendants in a "4R" proceeding should be reviewed and determined by this Court.

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[19] In New York, there is a statutory structure for a interstate railroad to challenge its local assessments. New York Real Property Tax, Article 7, Sections 700, et seq. and Section 512. There is also a statutory structure for the railroad to challenge its "railroad ceiling" or exemption. New York Real Property Tax Law, Sections 489-kk and 489-ll.

CONCLUSION

For the reasons presented in this petition, the Court should grant a Writ of Certiorari for the review of this matter and the decision below.

Dated: April 25, 1995

Respectfully submitted,

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Opinion of the United States Court of Appeals for the Second Circuit Decided January 31, 1995.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 2025, 2026, 2027, 2028, 2029—August Term, 1993

Argued: June 3, 1994 Decided: January 31, 1995

Docket Nos. 94-7226, 94-7228, 94-7234, 94-7238, 94-7240

CONSOLIDATED RAIL CORPORATION,

Plaintiff-Appellee,

—against—

TOWN OF HYDE PARK; VILLAGE OF CORNWALL, CITY OF BUFFALO; ONONDAGA COUNTY; BUFFALO CITY SCHOOL DISTRICT; ROCHESTER CITY SCHOOL DISTRICT; EAST SYRACUSE-MINOA CENTRAL SCHOOL DISTRICT; CHAUTAUQUA COUNTY; ORANGE COUNTY; RAVENA-COEYMANS-SELKIRK CENTRAL SCHOOL DISTRICT; CITY OF BINGHAMTON; CENTRAL SCHOOL DISTRICT and MONROE COUNTY,

Defendants,

STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK; DAVID GASKELL, in his official capacity as Executive Director of the Division of Equalization and Assessment and his successors in office; ERIE COUNTY; CITY OF ROCHESTER and NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,

Defendants-Appellants.

Before:

NEWMAN, *Chief Judge*,
OAKES and PRATT, *Circuit Judges*.

Appeal from an order certifying a class and granting a preliminary injunction in the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge*.

Affirmed.

JUDITH T. KRAMER, Assistant Attorney General of the State of New York (G. Oliver Koppell, Attorney General of the State of New York, of Counsel), *for Defendants-Appellants SBEA and David Gaskell.*

LINDA S. KINGSLEY, Corporation Counsel, City of Rochester (Susan L. Hauser, Municipal Attorney, of Counsel), *for Defendant-Appellant City of Rochester.*

JAMES K. RILEY, Pearl River, NY (O'Connell & Riley, of Counsel), *for Defendant-Appellant North Rockland Central School District.*

KENNETH SCHOETZ, County Attorney, County of Erie, Buffalo, NY, *for Defendant-Appellant Erie County.*

GREGORY G. FLETCHER, Memphis, TN (Heiskell, Donelson, Bearman, Adams, Williams & Caldwell; Loselle Greenawalt Kaplan Blair & Adler, James N. Blair, of Counsel), *for Plaintiff-Appellee.*

PRATT, *Circuit Judge*:

Consolidated Rail Corporation ("Conrail") is an interstate railroad that operates in New York State and elsewhere. Conrail filed this suit against the New York State Board of Equalization and Assessment and several tax-assessing and tax-collecting jurisdictions under § 306 of the Railroad Revitalization Act and Regulatory Reform Act of 1976 ("4-R Act"), currently codified at 49 U.S.C. § 11503. That section prohibits discriminatory taxation of railroads by states and their municipal subdivisions. Following substantial increases in its real-property tax assessments, triggered by the expiration of a law that provided an enhanced railroad ceiling, Conrail moved in the district court for a preliminary injunction against further assessment, levy, or collection of discriminatory *ad valorem* taxes in New York. The district court granted the preliminary injunction on conditions, and also granted Conrail's motion to certify a defendant class. For the reasons set forth below, we affirm both rulings.

A4

BACKGROUND AND FACTS

Conrail is an interstate carrier by rail that owns taxable rail-transportation property subject to *ad valorem* taxation in New York State. Its New York property is scattered among the assessing jurisdictions of some 309 towns, villages, cities, and counties across the state. Upon assessment determinations made by these 309 assessing jurisdictions, over 700 collecting jurisdictions—cities, towns, villages, school districts, and special districts—levy real property taxes that Conrail is required to pay annually. The assessments of Conrail's property made by each assessing district are based on, or at least affected by, valuations determined by the New York State Board of Equalization and Assessments ("SBEA").

Conrail contends that the taxes levied against it for 1993, which are calculated under the New York Real Property Tax Law ("NYRPTL") and based primarily on evaluations made by the SBEA, violated the 4-R Act by discriminatorily overvaluing Conrail's rail-transportation properties throughout the state.

The 4-R Act prohibits state and local governments from assessing railroad property for property tax purposes at a value that bears a higher ratio to its true market value than the ratio of assessed value to true market value for all other commercial and industrial property in the same assessment jurisdiction. In order to obtain relief under the statute, the ratio for Conrail's rail transportation property must exceed, by at least 5%, the calculated ratio with respect to all other commercial and industrial property.

Under New York's statutory system, the real-property tax assessments for Conrail's properties are legally and technically determined by the assessors for the municipalities that have assessing functions where the Conrail properties are located. NYRPTL § 489-cc. In practical effect, however, the "railroad ceilings" that are determined by the SBEA become the actual assessments for Conrail's property in the vast majority of assessing jurisdictions in the state.

The NYRPTL provides for railroads a partial tax exemption known as the railroad ceiling. Under this exemption, the SBEA, a state agency, establishes a ceiling for the assessment of a railroad's property in each individual assessing jurisdiction; above that ceiling the owner of the railroad property is exempt from real property taxes. Thus, if a local assessor assessed a particular Conrail property at $100,000 and the "railroad ceiling" for that property was determined by the SBEA to be $90,000, Conrail would be exempt from any taxes that were based on the excess $10,000 of assessment. This railroad-ceiling legislation is found in NYRPTL §§ 489-dd(4) and 489-ee, *et seq*. The method for calculating the railroad ceilings is specified by statute. NYRPTL §§ 489-33 through 489-jj. These calculations are made by the SBEA and are, in part, a function of local property values set in each assessing jurisdiction by local assessors. This is because one component of the ceiling is the state equalization rate for each assessing jurisdiction. NYRPTL § 489-ee(3).

To determine state equalization rates, the SBEA selects sample parcels in each assessing jurisdiction, appraises them to determine their respective market values, and then divides those market values by the assessed values for the selected parcels. Those assessed

values represent local assessment determinations made by the assessors in each assessing jurisdiction. The results provide the state equalization rate for each assessing district.

For most properties, values are determined by local assessors. Railroad properties, however, receive special treatment in New York. In order to determine the railroad ceiling—the maximum amount at which a local jurisdiction may assess its railroad properties—the SBEA undertakes to evaluate all rail-transportation properties throughout the state—assessing district by assessing district. To do this it determines the local reproduction cost, which is sum of the reproduction costs less depreciation, and then adds to it the value of the land. This figure the SBEA treats as the true market value.

Next the SBEA computes an "economic factor", which is determined by dividing Conrail's operating expenses by its revenues, averaged over the last five years, and comparing the result to figures in a statutory table that indicates the economic factor to be applied. The local reproduction cost is then multiplied by the economic factor to give the full taxable value of the property.

The SBEA next consults its previously determined state equalization rates for the assessing jurisdictions. These represent the ratios in each jurisdiction of the total assessed value of taxable property to its estimated market value, expressed as a percentage.

Finally, the railroad ceiling for each assessing jurisdiction is calculated by multiplying the full taxable value of Conrail's rail-transportation property in that jurisdiction by the state equalization rate for that jurisdiction. The railroad ceiling thus computed represents

the highest assessed value that an assessing jurisdiction may apply to Conrail's property. NYRPTL § 489dd(4).

In 1987 the New York State legislature established an enhanced railroad ceiling by altering the economic factor so that it provided additional tax relief for railroads. That relief continued until the Spring of 1993 when the legislature considered extending this additional property tax exemption for railroads for another year, but ultimately failed to continue the exemption. Thus, on March 1, 1993, the enhanced railroad ceiling expired, with the result that in the great majority of New York's assessing jurisdictions, Conrail's tax assessments increased by seventy percent. The increase did not represent any change in true market value, but resulted from changes in calculating depreciation and from the legislature's change in the economic factor.

Conrail asserts, and defendants do not disagree, that most of the assessing jurisdictions simply adopt the railroad ceiling, as calculated by the SBEA, in lieu of making their own independent assessments of the railroad properties in their jurisdictions, and the record supports that assertion. In 1993, 248 of the 309 assessing jurisdictions (80%) assessed Conrail's transportation property at the railroad ceiling, and 17 others assessed within 3% of the ceiling. Twenty-one jurisdictions assessed at the lower 1992 ceiling applicable before lapse of the five-year-old enhanced railroad ceiling, but this presumably indicates that the assessment rolls in those jurisdictions had not been updated after the enhanced railroad ceiling expired.

For the 1993 tax year, the SBEA fixed the railroad ceilings on Conrail's rail-transportation property in all of New York State at a total of $580 million, based on an

appraised true market value of $924 million. Conrail maintains, however, that the true market value of its taxable rail property is $451 million. If Conrail is correct, its state-wide ratio of assessed to market value would be 129% ($580 million divided by $451 million = 129%).

In contrast, the same ratio for all other commercial and industrial property in the state is an average of 48%. Thus, Conrail contends, its assessments in New York State are vastly excessive and must be reduced so that the nondiscrimination requirement of the 4-R act is satisfied. Applying the 48% ratio of commercial and industrial property to Conrail's claimed true market value of $451 million would reduce its New York assessments by $216 million to $235 million.

On September 20, 1993, Conrail filed this class-action suit against the SBEA; its executive director, David Gaskell; and selected assessing jurisdictions and taxing districts around the state. It claims that in calculating the railroad ceilings the SBEA overvalued its rail-transportation properties, so that when the vast majority of the assessing jurisdictions in the state followed their usual practice and adopted the ceilings as their local assessments, it caused assessment-ratio discrimination in violation of the 4-R Act.

Conrail did not dispute the assessments on its properties up to the amounts that had been assessed in 1992—before the enhanced railroad ceiling expired. After the increases, however, Conrail brought this action and moved for a preliminary injunction against the further assessment, levy, or collection of the disputed portion of its 1993 tax bills that were payable beginning January 31, 1994, *i.e.*, the amounts that exceeded what the levies would have been if based on the 1992 assess-

ment levels. Conrail also moved to certify a defendants' class under F.R.C.P. 23.

In support of its motions, Conrail relied on the affidavits of several financial and economic experts who explained and criticized the SBEA's method of calculating the railroad ceiling. In particular they challenged the SBEA's use of the "cost approach", which calculates true market value as replacement cost of improvements less depreciation plus land value. Conrail's experts preferred alternate valuation methods: 1) the "income capitalization method", which converts anticipated future economic benefits to present value by discounting the periodic income attributable to an asset over its economic life; and 2) the "stock and debt method", which calculates true market value by adding the market value of all outstanding securities to the value of leased property and other obligations.

The defendants countered that the state did not assess properties; that only the local jurisdictions made assessments; that the state was, in any event, entitled to choose its own method of valuation; and that its choice, the cost approach, produced the true market value for Conrail's properties. They also challenged several aspects of the appraisals and calculations made by Conrail's experts.

On January 7, 1994, the district court granted Conrail's motion for a preliminary injunction and certified the defendant class. As to the preliminary injunction, the district judge indicated that he was guided by the plain meaning of the statute, and based on the uncontested facts, he found reasonable grounds to believe that a violation of the statute had occurred, or was about to occur, and that injunctive relief was required. He therefore enjoined anyone having actual notice of his order from

collecting 1993 taxes from Conrail in excess of the amount of tax calculated under Conrail's 1992 railroad ceiling in each jurisdiction, multiplied by the applicable 1993 tax rates.

To protect the interests of the affected municipalities, the district judge further ordered: 1) that Conrail deposit into the court registry the additional taxes whose collection he had enjoined; 2) that Conrail pay to each jurisdiction that issues a tax bill, the amount of 1993 *ad valorem* taxes not enjoined by his order; 3) that all tax collecting jurisdictions to whom Conrail pays 1993 taxes must accept the reduced payments; 4) that all taxing jurisdictions are enjoined from initiating adversary proceedings regarding the deficit in the tax payments; 5) that Conrail post a $1 million dollar bond as security for payment of penalties, interest, or other damages should they accrue; 6) that there be a prompt trial on the merits; and 7) that notice of the order be served upon each taxing jurisdiction to which Conrail pays *ad valorem* taxes.

As to certification of the defendant class, the district judge defined the class as

> all New York assessing, levying or collecting jurisdictions in which Conrail holds rail transportation property subject to ad valorem taxation or to which Conrail pays ad valorem taxes.

The court also held that while the SBEA and its executive director are proper parties to the action, they should not be class representatives, because they might represent interests that differ from those of the assessing and collecting entities. Instead, he held:

> The class representatives shall consist of the defendants presently before the court which have actually

> appeared in this matter prior to today and also the 10 largest taxing entities in terms of money paid to them who are affected by the final judgment in this case.

The district judge also found that pursuant to F.R.C.P. 23(b)(3), a class action is superior to any other method for a fair and efficient adjudication of the controversy, because the interests of any individual member in controlling its defense is minimal; in any event, however, the court indicated that any member of the class was free to opt out of the class and intervene as a party so as to be able to present its own defense. (We were told by counsel on this appeal that no one had opted out and that the time to do so had expired.)

The court found that the case should be litigated in a single forum because the issues are "rather narrow" and that "the issue of fair market value is [not] necessarily directly related to taxing entity boundaries but rather probably reflects more clearly the segments or portions of Conrail's system in the state of New York."

The SBEA and its executive director, David Gaskell, Erie County, the City of Rochester, and North Rockland Central School District now appeal from these orders, contending that: (1) the preliminary injunction should not have been granted, because Conrail presented no reliable evidence upon which to establish a violation of the 4-R Act; and (2) that the defendant class certified by the district court failed to satisfy the requirements of F.R.C.P. 23.

DISCUSSION

A. *Preliminary injunction.*

We note first that an interlocutory order granting a preliminary injunction is appealable under 28 U.S.C. § 1292(a)(1).

The SBEA, its executive director, and three of the municipal defendants contend that the district court abused its discretion when it granted the preliminary injunction. They argue that the SBEA is not an assessing jurisdiction; that its railroad ceilings are not assessments; that the SBEA may choose what method is to be used to determine true market value; and that the evidence presented was insufficient to support the conclusion that a violation of the 4-R Act occurred, or was about to occur. They also assert that the district court lacked the "probative evidence" required in order to determine either 1) the value of Conrail's property in New York State, or 2) the value of all other commercial and industrial property in the state.

Traditionally and generally, "[a] preliminary injunction may issue if the plaintiff demonstrates irreparable harm, and either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor". *Polymer Technology Corp. v. Mimran*, 975 F.2d 58, 61 (2nd Cir. 1992) (citations omitted). We review the granting of a preliminary injunction for abuse of discretion. *Id.*

However, a railroad seeking statutorily authorized injunctive relief from alleged tax discrimination under the 4-R Act is not governed by these equitable criteria.

Burlington Northern R. Co. v. Department of Revenue of State of Wash., 934 F.2d 1064 (9th Cir. 1991). For such a statutory injunction, a railroad need only demonstrate that there is "reasonable cause" to believe that a violation of the 4-R Act has occurred or is about to occur. *CSX Transp. v. Tennessee Bd. of Equalization*, 964 F.2d 548, 551 (6th Cir. 1992).

1. *The 4-R Act.*

The purpose of the Railroad Revitalization and Regulatory Reform Act of 1976 was to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system in the United States". Pub. L. 94-210 § 101(a); *see Burlington Northern R. Co. v. Oklahoma Tax Com'n.*, 481 U.S. 454, 457 (1987); *Union Pacific R. Co. v. Public Utility Com'n.*, 899 F.2d 854 857. As applied to this case the 4-R Act provides, in relevant part, as follows:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a state or subdivision of a State may not do any of them:
>
> > (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
> >
> > (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection;
> >
> > * * *

> (c) Notwithstanding section 1341 of title 28 [the Tax Injunction Act] and without regard to the amount in controversy or the citizenship of the parties, a district court of the United States has jurisdiction * * * to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value to true market value is governed by State law.
>
> * * *.

47 U.S.C. § 11503.

We note that while subsection (b) of the statute requires that there be no discrimination at all between railroad property and other commercial and industrial properties in the ratios of their assessments, subsection (c) denies the railroad any remedy unless it proves that its own ratio exceeds the other properties' ratio by at least 5%. While the issue has not been focussed on so far in this case, there has been some dispute in the case law as to whether the 5% refers to 5% *of* the railroad's ratio, or to 5% *of* the ratio for the other properties, or to five percentage points *between* the two ratios. *See, e.g. Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981); *Southern Ry. v. State Bd. of Equalization*, 712 F. Supp. 1557, 1565-66 (N.D. Ga. 1988); *Arkansas-Best Freight System, Inc. v. Cochran*, 546 F. Supp. 904 (M.D. Tenn. 1981); and *Louisville and Nashville R. Co. v. Louisiana Tax Commission*, 498 F. Supp. 418 (M.D. La. 1980).

As a guide to the parties and to the district court in the further proceedings that will probably be necessary in this action, we think the language of the statute is clear: when it says that the railroad ratio must exceed the ratio of the other properties by 5%, it intends to apply the 5% to the ratio for the other properties. In this case, therefore, should it ultimately be proven, for example, that the ratio for the other properties is 48%, as Conrail alleges, then in order to obtain any remedy, Conrail would have to prove that the ratio for its own properties was in excess of 105% of 48%, or in other words that it exceeded 50.4%.

As the case is now presented to us, the discrepancy in ratios is far greater than the 5% required to entitle Conrail to relief, provided however, that the true market value of Conrail's property is significantly below the value assigned to it by the SBEA. Of course, the SBEA's evaluation is based on the cost approach, and the use of that method is very much in dispute. However, we need not determine at this juncture the ultimate validity of the method of valuation used by the SBEA; our threshold issue is whether, based on the evidence presented, the district court had reasonable cause to believe that a violation of the 4-R Act had occurred or was about to occur.

2. *The Calculations.*

Conrail's ultimate obligation will be to demonstrate that the ratio of assessed to market value of its property exceeded, by at least 5%, the same ratio for all other commercial and industrial property in the assessing districts.

Conrail provided affidavits from three experts to show that all of its transportation property in New York had an

"assessed value" of $580 million and a "true market value" of $451 million, thus indicating a ratio for the whole state of 129%. By contrast, the corresponding ratio of assessed value to market value for commercial and industrial properties in New York State was calculated at 48%.

If Conrail's figures are correct, therefore, the 129% ratio of "true market value" to "assessed value" of Conrail's railroad property in New York is far in excess of the ratio for corresponding commercial and industrial property and therefore violates the 4-R Act. Of the four figures underlying this determination three are not seriously in dispute: Conrail's assessed valuation, and the assessed and true market values of other commercial and industrial properties. All of those figures Conrail takes from defendants' records. The major controversy is over the fourth figure in the calculation—the true market value of Conrail's property.

This controversy stems primarily from the difference in appraisal methods. The SBEA had used the "cost approach" method for determining true market value, while Conrail's experts have applied both the "income capitalization method" and the "stock and debt" method. However, even if defendants' true market value of $974 million is accepted, the resulting ratio for Conrail would be 63% ($580 assessed value ÷ $924 true market value = 63%), and this, too, would be a violation of the 4-R Act.

Even at this simplistic level, therefore, it appears that the district court had reasonable cause to find that for the 1993 tax year the 4-R Act was violated or was about to be violated.

3. *The "Assessment".*

Defendants also argue that the railroad ceiling is not an "assessment" within the meaning of the 4-R Act. An "assessment" under the 4-R Act is defined as a "valuation for a property tax levied by a taxing district." 49 U.S.C. § 11503(a)(1).

In New York, railroads are entitled to a partial tax exemption, known as the railroad ceiling, codified as NYRPTL § 489aa *et seq*. The railroad ceiling represents the maximum assessed value at which railroad property may be taxed, and it is calculated by the SBEA as follows:

1) Determine AVERAGE RAILWAY REVENUES for most recent five years.

2) Determine AVERAGE RAILWAY EXPENSES for most recent five years.

3) Calculate the RATIO to the nearest thousandth of one percent.
RATIO = AVERAGE EXPENSES ÷ AVERAGE REVENUES

4) Determine ECONOMIC FACTOR from statutory table, interpolating to nearest tenth of one percent.

RATIO FACTOR	*ECONOMIC FACTOR*
1.0 or more	20%
.9	40%
.75 or less	100%

5) Determine LOCAL REPRODUCTION COST for each assessing unit:
a = (Cost of reproduction new) – (depreciation of RR real property other than land)

b = (value of land) + (value of rights in land)
c = LOCAL REPRODUCTION COST = a + b

6) Determine STATE EQUALIZATION RATE for each assessing jurisdiction.

   STATE EQUALIZATION RATE = assessed value ÷ full market value.

7) Calculate TAXABLE VALUE:
   TAXABLE VALUE = LOCAL REPRODUCTION COST x ECONOMIC FACTOR

8) Calculate RAILROAD CEILING:
   RAILROAD CEILING = TAXABLE VALUE x STATE EQUALIZATION RATE

One of the key elements in computing the railroad ceiling is the state equalization rate, which represents the ratio of total assessed values of taxable real property in an assessing unit to the total of SBEA's estimates of market values of those properties. The SBEA determines the equalization rate periodically for each assessing unit in the state.

In order to determine the value of taxable real property in the state, the SBEA cannot simply adopt the local "assessed" value, due to the incompatible local calculations of assessed value. The SBEA, therefore, is charged with "equalizing" these discrepancies by setting a standard known as "full value". SBEA appraisers examine a random sample of properties from each assessing unit to determine their market values. These appraised market values are compared to the assessed values established in the assessing unit, to produce a ratio of assessed value to market value for that unit. *Understanding the Equalization Rate*, (New York State Division of Equalization and Assessment 1990), 2-3.

We recognize that as a formal matter each assessing district makes its own determination of the final assessed value for Conrail's property in the district. Whatever assessment is fixed is then used by each taxing district to calculate local taxes charged to Conrail. The record shows, however, a widespread adoption of the railroad ceilings fixed by the SBEA. The vast majority of assessing units apparently make no separate, independent valuations of Conrail's property in fixing the local assessed value. Instead, they simply adopt the ceiling calculated by the SBEA. Realistically, therefore, when the SBEA determines the railroad ceiling for the 309 assessing districts in the state that include Conrail property, it is in practical effect determining Conrail's actual assessments in 80% of those districts. Consequently, for the great majority of assessing jurisdictions the railroad ceiling fixed by the SBEA is "a valuation for a property tax" that will be "levied by a taxing district." It therefore fits the statute's definition of an "assessment". 49 U.S.C. § 11503(a)(1).

4. *Method of Appraisal.*

Relying primarily on a decision by the fourth circuit in *Chesapeake Western Ry. v. Forst*, 938 F.2d 528 (4th Cir. 1991), the SBEA contends that Conrail is bound by the method of appraisal that the SBEA has chosen, and that since it chose to use the cost approach, it is improper to consider any other method of valuation in fixing the "true market value" of Conrail's properties. The *Chesapeake* court viewed the method of appraisal as a matter of state policy that was beyond the reach of the 4-R Act. We do not accept that interpretation of the statute. What the 4-R Act prohibits is discrimination against railroads in the ratios of two sets of numbers:

assessed values and true market values of the railroad's property vis à vis those of other commercial and industrial properties. To avoid the prohibited discrimination, the SBEA must apply the same valuation standards and methods to the railroad property as are used on the commercial and industrial properties to which it is compared. If the Act were to be interpreted, as defendants would have it, so that the SBEA could adopt a special appraisal method for railroads alone, then the whole nondiscrimination objective of the statute could be circumvented.

On the record before us it appears—from the marked increase in assessments that occurred when the enhanced railroad ceiling lapsed as well as from the state's own evaluation of the true market value of Conrail's properties—that the disparity in ratios substantially exceeds the 5% tolerated by the 4-R Act. We therefore conclude that the district court did not err in determining that there was reasonable cause to believe that the 4-R Act was violated or was about to be violated. Nor did the district court abuse its discretion in granting a preliminary injunction, conditioned as it was on financial protections to the defendant taxing districts. We therefore affirm the order of the district court granting the preliminary injunction.

We realize that once the court has determined the proper method for the SBEA to calculate the railroad ceiling so as not to violate the 4-R Act, there may still be a few problems remaining whose solution is not then readily apparent. When and if that stage is reached, the district court has ample discretion under current class-action law to fashion suitable relief either by establishing subclasses or by decertifying the defendant class once it has served its purpose. We are fully confident

that the district court will be able to fashion relief appropriate to the circumstances.

B. *Class certification.*

Defendants-appellants North Rockland Central School District, Erie County, and the City of Rochester challenge the district court's certification of the defendant class. They claim that Conrail failed to demonstrate commonality, typicality, and adequacy of representation—three of the four requirements of F.R.C.P. 23(a).

An order granting or denying class certification is not itself appealable. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). However, a court of appeals that has jurisdiction over one appealable order may simultaneously exercise pendent appellate jurisdiction over an otherwise non-appealable order, (*Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 698 F.2d 1501 1503 (2d Cir. 1983)), although acceptance of pendent jurisdiction is discretionary. *General Motors Corp. v. Gibson Chemical & Oil Corp.*, 786 F. 2d 105, 108 (2d Cir. 1986). Here, the district court's order granting a preliminary injunction, which is an appealable order under 28 U.S.C. § 1992(a), provides us directly with appellate jurisdiction; we also have discretion under the doctrine of pendent appellate jurisdiction to review the district court's related order certifying the defendant class, and in the circumstances of this important case we choose to exercise that discretion.

A district court's decision to certify a class will be overturned only if the district court abused its discretion. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290 (2d Cir. 1992). We hold that the district court did not abuse its discretion in certifying the class under

Rule 23, and thus affirm the order granting class certification.

F.R.C.P. 23 (a) specifies that

> one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Although plaintiff classes are certified more frequently, we have held that the above requirements apply equally to plaintiff and defendant classes. *See Marcera v. Chinlund*, 595 F.2d 1231, 1237 (2d Cir. 1979), *vacated on other grounds*, 442 U.S. 915, (1979).

1. *Numerosity.*

In the State of New York there are over 700 tax-collecting jurisdictions to which Conrail pays taxes, and those taxes are based in part on assessed valuations imposed by over 300 assessing jurisdictions. To the extent that there are common issues affecting the defendants, individual adjudications of Conrail's claims would be unnecessarily expensive and time-consuming, and enormously burdensome on the courts. A group of this size would make the joinder of individual members as named defendants impracticable. *See In re Drexel*, 960 F.2d at 290. Because numerosity is presumed at a level of 40 members (1 *Newberg On Class Actions 2d*, (1985 Ed.) § 3.05), whether viewed as 700 tax-collecting jurisdictions or 300 assessing jurisdictions, the number of

defendants vastly exceeds this threshold. Numerosity is therefore satisfied.

2. *Common Questions of Law or Fact.*

Each jurisdiction is mandated by NYRPTL not to exceed the railroad ceilings established by the SBEA, and 80% of the jurisdictions simply adopt the ceilings as their Conrail assessments. Should the district court ultimately find that SBEA's calculation of the railroad ceilings produced assessments that violate the 4-R Act, as Conrail contends and has preliminarily demonstrated, then the 309 assessing jurisdictions must recalculate their assessments for Conrail's properties, and the 700 tax-collecting agencies will have to recalculate the taxes levied against those properties and make appropriate monetary adjustments.

It is true, as defendants contend, that each of the 309 assessing jurisdictions acts independently in fixing the assessed values of Conrail's taxable properties within its boundaries. But that appears to be more formal and technical than substantive, in light of the fact that most jurisdictions make no attempt to separately evaluate Conrail's property, but simply adopt the state's railroad ceilings as their own assessments. We therefore reject defendants' assertion that the individual valuation issues would necessarily predominate at trial.

3. *Typicality of Defenses.*

Rule 23(a)(3) is satisfied "when each class member's [defense] arises from the same course of events, and each class member makes similar legal arguments to [defend against the plaintiff's allegations]". *In re Drexel*, 960 F.2d at 291.

The arguments advanced by those who oppose having a defendants' class offer the firmest proof that the requirement of F.R.C.P 23(a)(3) is satisfied. The proffered defenses are typical to all members of the proposed defendants' class: 1) each locality plays a different role in assessing and collecting taxes from Conrail; 2) each assessing entity acts independently to determine property values; 3) some defendants are just collecting entities and have no role in the assessment scheme; and 4) the key issue does not involve individual taxing entities, but stems from the SBEA's interpretation of how to calculate the railroad ceiling.

Each member of the defendant class participates in New York's system of taxation. Whether a particular defendant is an assessing entity or a collecting entity, or both, it is still a part of the New York system for taxing railroad properties, a system that is, in large part, operated and controlled by the SBEA.

4. *Adequacy of Representation.*

F.R.C.P. 23(a)(4) does not require a willing representative, merely an adequate one. Where there are legal issues common to the class, the representative who defends his own interests will also be protecting the interests of the class. *Marcera v. Chinlund*, 595 F.2d at 1239.

Although most class certifications deal with a plaintiff class, we think that under the circumstances of this case the district court properly exercised its authority to certify a defendant class. Unlike a plaintiff class, where the named plaintiffs willingly choose to litigate as class representatives, the designated representatives in a defendants' class do not choose to be sued. The district court, however, appropriately granted the designated repre-

sentatives—the named defendants together with the 10 highest tax collectors in the defendant class—an opportunity to present reasons why they should be excluded as representatives.

The class representatives would have us believe that none have an interest in the outcome of this case beyond their own respective jurisdictions. They assert that their only interest is in preserving their own taxable property base. As a result, they contend, the thrust of the appraisers' expert testimony on valuation would be narrowly focused on individual properties in particular districts, so that no defendant could adequately represent other class members.

By including as class representatives the 10 highest tax collectors from Conrail as well as all of the named defendants except the SBEA and its director, the district judge created a fair group of representative parties who presumably have the greatest financial motivation to defeat Conrail's case.

The designated representatives control a substantial part of Conrail's total assessment in New York State and therefore have sufficient interest in the outcome to fairly and adequately represent the remaining class members. It may be true, in a narrow sense that no local entity has a particular stake beyond its own borders; but behind the particularity of each local assessment lies the dominating, common issue of whether the SBEA's calculation of the railroad ceiling produces results throughout the state that violate the 4-R Act. If the railroad ceilings must be changed, then the assessments and the local taxes that are based on those assessments must also be changed in that great majority of assessing and taxing jurisdictions who simply adopt the figures determined by the SBEA.

Therefore, we are satisfied that in defending their own interests, the designated representatives will adequately and fairly protect the interests of the remaining class members in compliance with F.R.C.P. 23(a)(4).

5. *F.R.C.P. 23(b)(3).*

In order to obtain certification of a class under Rule 23, the moving party must establish not only that the putative class satisfies all four requirements of section (a), discussed above, but also that it fits within at least one of the categories specified in section (b). *In re Drexel*, 960 F.2d at 290. As the district court found, this case fits within subsection (b)(3), which states:

> [A]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to any other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

We agree with the district court's evaluation. The interest of any one party in controlling the defense is

minimal, and any designated class representative could have declined to serve upon a showing of good cause. No litigation of this controversy is currently pending elsewhere, and it would be in the interest of judicial economy to litigate in one forum the narrow issue of the proper method of determining true market value.

The true market value of Conrail's properties hinges largely on the proper method for determining it, and this presents issues common to every class member. Litigating in one forum would adequately serve the interests of all 700 taxing jurisdictions instead of repeatedly litigating the same issue and possibly getting conflicting results.

Conrail asserts that the class certification also meets the criteria under F.R.C.P. 23(b)(1) and (2). However, it is not necessary to consider these claims since F.R.C.P. 23(b) requires satisfaction of only one.

We have considered the other arguments advanced by the defendants and find them to be without merit.

CONCLUSION

Since the district court did not abuse its discretion when it granted the motion for a preliminary injunction and certified the defendant class, we affirm both orders.

Transcript of Oral Decision of Honorable Charles L. Brieant, District Court Judge of the United States District Court for the Southern District of New York Rendered January 7, 1994.

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 6548.

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

- against -

STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK; DAVID GASKELL, In His Official Capacity as Executive Director of the Division of Equalization and Assessment of the State Board of Equalization and Assessment and his Successors in Office; ERIE COUNTY; TOWN OF HYDE PARK; CITY OF BINGHAMTON; CITY OF ROCHESTER; VILLAGE OF CORNWALL; and NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,
Defendants.

United States Courthouse
White Plains, New York

January 7, 1994
Excerpt

B E F O R E:

HON. CHARLES L. BRIEANT,
District Court Judge

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[4] PROCEEDINGS

THE COURT: Thank you very much.

I really do appreciate the efforts of the attorneys. The Court is guided essentially in its resolution of these matters, which I'll take one at a time, but essentially guided by the plain meaning and the direction of the statute, and the Court is also relying on the *Chesapeake* case in the Sixth Circuit, and there's also a Tenth Circuit case, and some other cases we looked at a day or two ago, and they're all cited in the papers.

The Court finds, based on the uncontested facts which are presently before us, that there is probability of success and reasonable cause to believe that the assessment may have more likely than unlikely exceeded the criteria in Section 11,503 of Title 49, subparagraph (C). That's based on all the information which has been set forth today and not relying solely on the Schoenwald affidavit.

The Court observes, furthermore, that generally assessments do relate to market value of property and the very substantial nature of the increase standing alone is some evidence to give this Court reasonable grounds to believe there is a violation of the statute which has occurred, or is about to occur.

Injunction standards here are set by [5] Congress, and apparently drawn in the apprehension on the part of the draftsman that the 11th Amendment might prevent, at least in some states, an order for a refund. I don't have to reach that conclusion.

So far as concerns this case, the Court is not required to make the traditional equity findings under *Jackson Dairy*, but instead need ony be satisfied by a preponderance of the credible evidence that there's

reasonable cause to believe that the violation of this statute has occurred or is about to occur, and I so find, and that it's likely to exceed 5 percent in amount of tax.

The Court believes that Congress can establish a separate standard for preliminary injunctive relief in a specified class of cases without violating the separation of the powers. I think the validity of doing that is clear here because there's at least a reasonable apprehension that a full remedy could not be given after trial if the taxes were paid, and if it were held that the 11th Amendment prevents a refund—although as I said earlier I do not necessarily hold that that's so in the circumstances of this case—the irreparable harm is there if you can't get a refund.

The Court believes that the injunction should be limited as to its scope in balancing the equities and considering the public interest. The public [6] interest is involved on both sides of this controversy because Congress has found that public interest requires that Interstate Commerce should not be unreasonably burdened or discriminated against by a state or a subdivision of a state violating 11,503(b), so that the public interest is affected from the plaintiff's point of view.

The public interest is also seriously affected from the defendants' point of view. The Court takes judicial notice that a large number of taxing entities in the state, some 700 of them, many of which do not have assessment powers but must adopt or follow the assessment rolls which are filed by the county or town or village in which they're located, and that they have made their budgets and assessed their taxes on the other people based on a total assessment roll which included these railroad ceilings of the State Board of Equalization.

And the Court finds, however, that the detriment to the taxing authorities is largely eliminated by placing in the registry of this Court any taxes withheld from them together with a reasonable amount to assure payment of tax penalties due under the various taxing statutes and the burden on the taxing authorities at the worst will be either to temporarily use whatever surplus they may have, or issue tax anticipation notes [7] which the Court notes carry a much lower interest rate than the tax penalties which will ultimately be recovered if it turns out that the plaintiff is wrong or not entirely correct.

And the order will have to provide, and the Court believes, that the proper reference for the amount which may be withheld under the order is going to be the last year's assessment based on this year's, this taxing year's tax rates and not merely on Exhibit 1 or the Schonfeld affidavit.

The preliminary injunction, by its terms, shall prohibit anybody having actual notice in the order which shall be settled on notice from attempting to collect or attempting to sell liens or take any collection procedures on that part of the tax, the collection of which is stayed under the preliminary injunction.

The Court believes that even those bodies which do not assess are proper parties here and may be subject to the injunction, even though they merely collect or cause others to collect the taxes for them.

The complaint and the supporting papers do support a finding there's a reasonable probability of success because there may be a literal violation of the statute and that is sufficient under the *Richmond Fredericksburgh and Potomac* case, and the Court concludes [8] this is not a proper case for abstention. And because the Courts have been told by Congress this

is a proper issue to be raised without regard to diversity of citizenship and the ordinary provisions of Sections 1341 of Title 28 have been expressly obviated by this particular statute and a federal right is at stake. There's also no basis for summary judgment here on the issue of collateral estoppel arising from state tax certioraries in prior years and the summary judgment motion is denied.

The Court believes also that it should be a condition of this preliminary injunction there should be a prompt trial on the merits. Judge Broderick previously referred the matter to Magistrate Judge Fox and you at the earliest convenience should gather with him and see what can be done to expedite whatever pretrial proceedings and pleading matters have to be attended to with the intention of getting ready to try the case, because the court were it not assured there could be prompt trial, no injunctive relief could be granted. If for any reason there's an undue delay, the Court will hear any application to vacate the injunction.

The Court understands that the organic tax provisions of New York law may have triggered this sudden increase in the assessment without regard to the issue of true market value and that the so-called 129 percent [9] increase can be explained in that fashion.

However, on the totality of the evidence before me, it certainly appears, presuming regularity of the prior assessments, and that this is a tremendously large increase, and it's highly likely that fair market value, in terms of the federal statute, has no direct relationship to the assessments and is far less.

The Court declines to conclude there's any burden to prove irrationality. The only thing that has to be proved here is a violation of the federal statute.

And for the reasons set forth, the preliminary injunction is granted extending to everybody who collects taxes in New York on railroad property and who has actual and constructive notice of the injunction order.

The Court finds on the issue of class certification that there is a common issue which exists with respect to whether or not the assessments violate federal law and if so to what extent and a defendant class consisting of all entities assessing or taxing or receiving money from real estate taxes on railroad property in New York state is certified, limited to the issues in litigation as set forth in this particular complaint.

There may be matters peculiar to individual [10] assessing or taxing jurisdictions which should not be litigated within the class action, and it is possible that such matters could be excluded when the pretrial order is settled in the case. The Court shall require the plaintiff to submit a proposed notice to the defendant class, sent within 30 days to all of the persons or corporations or entities or units or whatever to which it pays real property taxes with documents attached thereto to give reasonable notice of the claim, and the Court will authorize service by first class mail on all of those persons.

The class representatives shall consist of the defendants presently before the court which have actually appeared in this matter prior to today and also the 10 largest taxing entities in terms of money paid to them who are affected by the final judgment in this case.

If any particular party is not willing to be a defendants' class representative, the Court will hear whether there's some special reasons to exclude that person or corporation or taxing entity as a class representative.

I specifically find the class is so numerous the joinder of all the members and having them all separately represented, approximately 700 defendants, is impractical. Anyone who wants to intervene should be [11] given notice of the right to intervene and file its separate pleadings and be represented by its own counsel within a certain number of days as to be set forth in the notice, so as to thereby opt out of the class.

The Court finds that the questions of law and fact are common to the class and that the State Board of Equalization and Assessments is a proper party, but should not be a class representative, because there may be interests on the part of the entities which assess and the entities which collect and receive that may differ from that of the State Board, which perceives itself not as an assessor of taxes, but merely responding to directions of the state legislature concerning computation of the railroad ceilings.

The Court finds that such representatives would adequately and fairly protect the interests of all the class and the Court is not dealing with any suggestion of assessing attorney's fees against absent class members unless that's taken up later after notice and hearing, which I really don't consider favorably but I don't rule it out.

And those questions of law and fact which are common predominate because practically all of the assessments, as a practical matter, were initiated by adopting the railroad ceilings. That may not be true in [12] Rochester, but I think it's true in most places.

I find pursuant to Rule 23(b)(3) a class action is superior to any other method, for a fair and efficient adjudication to the contrary. Particularly the certiorari proceedings in individual cases would not be an adequate

remedy as Congress clearly foretold here when they exempted this controversy from the general provisions of Section 1341.

The interest of any individual member in controlling the defense is minimal. But anybody who wants to opt out and intervene is free to do so after adequate notice. These issues should be litigated in one forum, the issues indeed are rather narrow, and the Court does not believe that the issue of fair market value is necessarily directly related to taxing entity boundaries, but rather probably reflects more clearly the segments or portions of Conrail's system in the state of New York.

The foregoing constitutes the findings of fact and conclusions of law of the Court, which also are reflected in my prior comments and response to the extensive colloquy we've been conducting here this afternoon, and the Court directs two separate orders be settled on notice, one granting the preliminary injunction on the terms stated, and the other one declaring the defendants' class action and providing notice opt out and [13] declaring the class representatives which the Court expects that Conrail will be able to identify by name.

Any class representative, of course, would have to be personally served with the summons and complaint and named as a party defendant and it's not clear to me whether the 10 leading taxpayers are currently included in the caption in this case, but certainly in fairness they ought to be, and their interests are of sufficient importance to assure a non-collusive disposition of the case and redound to the benefit of the absent class members when the case is tried to the merits.

Now, at this point I'd like to ask for additional formal findings and conclusions which any of you feel I should have addressed and have omitted either through inadvertence or haste, and I'll begin with the plaintiff.

Mr. Fletcher, do you have any additional requests?

MR. FLETCHER: May it please the Court, only a couple of housekeeping matters, your Honor.

Your Honor's order on injunction requires a recalculation of the taxes that—the undisputed portion of the tax.

THE COURT: If you have a better way, I'll entertain it. I thought that was fair.

[14] MR. FLETCHER: We simply ask, as a housekeeping matter, your order recite we be allowed for those tax bills we already received for '93 to allow us at least 20 days to recalculate the taxes due under your Honor's formula.

THE COURT: I don't think there's any objection to that, but I have to point out to you that if that carries you past the due date for payment, nothing in the injunction prevents the accrual of statutory penalties for late payment. We talked about that earlier.

MR. FLETCHER: Yes, sir. Yes, sir. May I have a moment, your Honor?

(Pause.)

MR. FLETCHER: Your Honor, the fundamental problem, we don't know the 1993 tax rates in some of these jurisdictions till we get the bill. For those jurisdictions we have received the bill, we'd like 20 days within which to recalculate.

THE COURT: All right. You want preliminary stay on any adverse collection methods in that interim?

MR. FLETCHER: Yes, sir.

THE COURT: That will be granted. I think there's a regular service CCH has that gives those rates. It's a loose-leaf service that gives those rates.

MR. FLETCHER: I have seen some of those [15] rates in CCH, I don't think it's exhaustive for us. We also have a lot of jurisdictions that bill based on assessments from multiple assessing units. Sometimes they don't always come in. We have the class of bills we have received. We also have a class of bills going to be coming in we have not yet received. As a housekeeping matter, we'd like the order to allow us 10 days from the receipt of those bills to recalculate the amount.

THE COURT: There's no detriment to the defendants in doing that and I so find.

MR. FLETCHER: And then, your Honor, after we have made the recalculation of the taxes, I think we need to have an agreed-upon period within which Conrail, after receipt of the bill, has to make its deposit to the registry.

THE COURT: And its payment of the portion which is not disputed.

MR. FLETCHER: That is correct, sir, if we would be allowed, after we've made this recalculation of the taxes due an additional—I want to say 10 business days.

THE COURT: You know, you're getting unduly complicated. You will find that most of the taxing entities do not accept partial payments unless directed to do so by some court. You may find that some of these tax [16] collectors are going to tell you pay all or nothing unless enjoined to accept a partial payment.

If they get the partial payment late, they're going to charge you the penalty on the whole thing.

MR. FLETCHER: Yes, sir.

THE COURT: You can construct a reasonably fair provision which would meet the intentions we all expressed here today.

MR. FLETCHER: Yes, sir.

THE COURT: That would probably have to enjoin them to accept the partial payments notwithstanding any local ordinance or statutes to the contrary.

MR. FLETCHER: Yes, sir.

THE COURT: And I might say you're still allowed to resort to the consent agreement you had with Judge Broderick. Go ahead.

MR. FLETCHER: That's all I've got to say, Judge. These are housekeeping matters.

THE COURT: Any other finding of fact or conclusion of law you want the Court to address in order you may have an adequate appellate record?

MR. FLETCHER: No, sir.

MR. KRAMER: The State would like a finding or conclusion of law with regard to the plaintiff's right to have PI granted based solely upon a challenge to the [17] method of evaluation used by the State rather than a challenge to the calculations or assessments made thereunder.

THE COURT: I will find they have no such right. They only have a right to make a challenge to an assessment which violates 11503(b) and I thought I did say that. How you got there is really beside the point, in my judgment.

MR. KRAMER: Your Honor.

THE COURT: They have to have a nonfrivolous allegation that the defendants violated the statute and must show, as I said earlier, the standard for injunctive relief.

MR. KRAMER: I thought in your decision you cited *Richmond Fredericksburgh*—

THE COURT: RFP, yes.

MR. KRAMER: —in support of your conclusion.

THE COURT: I'm really relying on *Chesapeake Ohio*.

MR. KRAMER: I understand that's the Fourth Circuit case, I believe.

THE COURT: Sixth, I believe, isn't it?

MR. FLETCHER: It's CSX Railroad, CSX Transportation is the Sixth Circuit.

[18] THE COURT: That's the one I was relying.

MR. KRAMER: You said *Chesapeake*.

THE COURT: That's CSX in my language.

MR. KRAMER: Well, in citing *Fredericksburgh (RFP)* you cited that no support of your statement there was a literal violation of the statute.

THE COURT: I said if they could show that there was—I hate to chew the same cabbage twice, it never comes out quite the same.

MR. KRAMER: It was unclear because, in that case, it's my understanding that the Court found they could only challenge—

THE COURT: Reasonable cause to believe a violation has occurred or about to occur. I relied on the Sixth Circuit case involving CSX Transportation in my oral findings in that regard. And that's all I'm relying on, and I find that they do not have to prove what you have just verbalized about the methodology of the state statutes in order to obtain preliminary or final injunctive relief.

Is that clear enough for you?

MR. KRAMER: Yes.

THE COURT: Thank you very much. Anyone else?

The Court appreciates very much your efforts [19] and your attendance here today, and I wish you all a safe trip home.

MR. FLETCHER: Thank you very much for your time, your Honor.

MR. RILEY: Thank you, your Honor.

MR. SCHOETZ: Thank you.

(Whereupon, at 2:49 o'clock p.m., the proceedings were concluded.)

[20] C E R T I F I C A T E

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

I, ANGELA BUCCIERI O'DONNELL, Registered Professional Reporter and Notary Public of the State of New York, do hereby certify that the foregoing transcript of proceedings taken at the time and place aforesaid, is a true and correct transcription of my shorthand notes.

I further certify that I am neither counsel for nor related to any party to this action, nor in any wise interested in the result or outcome thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of January, 1994.

/s/ ANGELA BUCCIERI O'DONNELL
Angela Buccieri O'Donnell, RPR

Order of District Court Granting Motion for Preliminary Injunction Escrowing $11.7 Million in Alleged Discriminatory Taxes Dated January 25, 1994.

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 6548 (CLB).

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

- against -

STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK; DAVID GASKELL, In His Official Capacity as Executive Director of the Division of Equalization and Assessment of the State Board of Equalization and Assessment and his Successors in Office; ERIE COUNTY; TOWN OF HYDE PARK; CITY OF BINGHAMTON; CITY OF ROCHESTER; VILLAGE OF CORNWALL; and NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,
Defendants,

In Their Own Behalf and, In the Alternative, As Representatives of a Defendants' Class.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION AND AUTHORIZING DEPOSIT OF FUNDS INTO THE REGISTRY

Plaintiff, Consolidated Rail Corporation ("Conrail"), has moved for a preliminary injunction against the further assessment, levy or collection of the

discriminatory portion of its ad valorem taxes in New York for the 1993 tax year.[1] Having heard Conrail's motion on January 7, 1994,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED for the reasons stated on the record that the motion should be, and is hereby, GRANTED, under the following terms and conditions:

1. Defendants, State Board of Equalization and Assessment of the State of New York ("SBEA"), Erie County, Town of [2] Hyde Park, City of Binghamton, City of Rochester, Village of Cornwall, and North Rockland School District, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise (including specifically all jurisdictions within the State of New York which assess, levy or collect ad valorem taxes from Conrail and which have actual or constructive notice of this order), **SHALL BE, AND ARE HEREBY, ENJOINED PENDING FURTHER ORDERS OF THIS COURT FROM FURTHER ASSESSING, LEVYING, OR COLLECTING FROM CONRAIL ANY AD VALOREM PROPERTY TAXES FOR THE 1993 TAX YEAR IN EXCESS OF THE AMOUNT OF TAX CALCULATED BY USING CONRAIL'S 1992 "RAILROAD CEILINGS" IN EACH JURISDICTION (AS PREVIOUSLY ISSUED BY THE SBEA), MULTIPLIED BY THE 1993 TAX RATES APPLICABLE IN EACH SUCH JURISDICTION.**

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[1] As used herein, the term "1993 tax year" refers to railroad ad valorem taxes that are based on 1993 "railroad ceilings" and are payable in 1993 and 1994.

2. By separate order, this Court also granted Conrail's motion under Fed. R. Civ. Pro. 23 for certification of a defendants' class comprised of all New York assessing, levying or collecting jurisdictions in which Conrail operates. It is this Court's intention that all members of the defendants' class having actual or constructive notice of this preliminary injunction be bound by it. (Defendants, State Board of Equalization and David Gaskell, while proper parties, are not members of the defendants' class.)

3. Conrail shall deposit all taxes enjoined by this Order into the Registry of this Court. The taxes deposited into [3] the Registry of this Court will serve as security for the issuance of this injunction as required by Rule 65(c).

4. Conrail shall deposit taxes enjoined by this Order into the Registry of this Court under the following schedule:

a. For all 1993 tax bills that have been received by Conrail as of the date of entry of this Order (except for school district tax bills that have been received and paid pursuant to the "Consent Order Regarding Payment of Valorem Taxes" entered September 28, 1993), Conrail shall tender to the Clerk of this Court for deposit into the Registry the amount of ad valorem taxes enjoined by this Order within ten (10) business days of entry of this Order, or when such taxes become due under the tax bill, whichever is later;

b. For each 1993 tax bill received by Conrail *after* the date of entry of this Order, Conrail shall tender to the Clerk of this Court for deposit into the Registry the amount of ad valorem taxes enjoined

by this Order within ten (10) business days from the date of receipt of the tax bill, or when such taxes become due under the tax bill, whichever is later.

5. Conrail shall pay to each jurisdiction that issues or has issued a tax bill the amount of 1993 ad valorem taxes that are not enjoined by this Order which is the amount of tax [4] calculated by using Conrail's 1992 "Railroad Ceilings" in each jurisdiction (as previously issued by the SBEA) multiplied by the 1993 Tax Rates applicable in each such jurisdiction under the same time limitations specified in paragraphs 4a and 4b above.

6. All New York tax collecting jurisdictions to whom Conrail pays 1993 taxes under this Order are hereby enjoined to accept payments made by Conrail.

7. As part of the preliminary relief granted herein, the named defendants, their officers, agents, servants, employees, and attorneys, and all those in active concert or participation with them, are further enjoined from initiating foreclosure proceedings or tax sales, imposing penalties or interest, denying Conrail any benefits of the railroad ceiling under RPTL ~~§40-MM~~ (489-MM), or taking any other action under New York law against Conrail for late payment of ad valorem taxes (in excess of those payable pursuant to para. 5, above) pending further orders of this Court.

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8. The Clerk of this Court (or his Financial Deputy) is hereby authorized and directed to deposit the sums received from Conrail into the Registry of this Court and into an interest-bearing account maintained through the Court Registry Investment System. The Clerk (or his Financial Deputy) is specifically authorized and directed to maintain a single account for all sums deposited by Conrail and to comingle all funds deposited by Conrail within the same account.

9. Conrail shall make deposits of taxes enjoined pursuant to the Registry by wire transfer, or in the form of a cashier's check payable to "Clerk, United States District Court," [5] and shall reference Docket No. 93 CV 6548 (CLB).

10. Since the amount of taxes enjoined and payable to the Registry cannot be ascertained until Conrail has received its 1993 tax bills, the provisions for Rule 8(c)(2)(i) of the (Local Civil) Rules of this Court do not apply to this Order. However, Conrail shall maintain (and make available to all parties and the Court) a written record of:

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a. Each 1993 tax bill received;

b. The amount of 1993 ad valorem taxes billed for each jurisdiction;

c. The amount of 1993 ad valorem taxes paid to each jurisdiction pursuant to this preliminary injunction and the date of such payment by Conrail; and

d. The amount of 1993 ad valorem taxes deposited into the Registry for each jurisdiction per this preliminary injunction and the date of each tender to the Clerk of this Court.

11. Upon payment of its ad valorem taxes to each jurisdiction under this Order, Conrail shall also furnish each jurisdiction with a written schedule showing the basis on which the enjoined amount of tax was calculated.

12. ~~Pursuant to Rule 8(c) and Appendix D of the (Local) Civil Rules of the United States District Court for the Southern District of New York~~, t(T)he Clerk (of Court) is authorized to deduct from the income on funds invested pursuant to this Order an amount not exceeding

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the ~~Registry fee assessment specified in Appendix~~ D (fees authorized by law).

[6] 13. The disposition or distribution of all funds deposited pursuant to this Order shall be made only pursuant to further orders of this Court.

14. Within ten (10) business days from the date of entry of this Order, Conrail shall post with the Clerk of this Court the bond of a surety qualified under Rule 37 of the Rules of this Court in the amount of One Million Dollars ($1,000,000), which sum shall stand as security for the payment by Conrail of such penalties, interest or other damages as this Court may assess (payable to any collecting jurisdiction) ~~at the conclusion of this action for the wrongful issuance of this preliminary injunction~~.

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15. A condition of this preliminary injunction is a prompt trial on the merits and, in the event of any undue delay, this Court will hear any application to vacate the injunction.

16. Counsel for Conrail shall serve via United States Mail, postage prepaid, a copy of this Order upon each New York County in which Conrail operates (addressed to the County Treasurer) and upon each New York assessing, levying, or collecting jurisdiction to which Conrail pays ad valorem taxes (addressed to the person or entity to whom such taxes are directed to be paid) within five (5) days of the date of entry of this Order.

17. This preliminary injunction will remain in full force and effect until and through the trial on the merits or pending further orders of this Court.

DATED: White Plains, New York
January 25, 1994

93 CV.6548 (CLB)
SO ORDERED

SO ORDERED:

CHARLES BRIEANT
United States District Judge
1-25-94

Order of District Court Certifying Defendants Class Dated January 27, 1994.

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEX NO.
93 Civ. 6548 (CLB).

CONSOLIDATED RAIL CORPORATION,
Plaintiff,

- against -

STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK; DAVID GASKELL, In His Official Capacity as Executive Director of the Division of Equalization and Assessment of the State Board of Equalization and Assessment and his Successors in Office; ERIE COUNTY; TOWN OF HYDE PARK; CITY OF BINGHAMTON; CITY OF ROCHESTER; VILLAGE OF CORNWALL; and NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,
Defendants,

In Their Own Behalf and, In the Alternative,
As Representatives of a Defendants' Class.

ORDER CERTIFYING DEFENDANTS' CLASS AND DIRECTING CLASS NOTICE

Plaintiff, Consolidated Rail Corporation ("Conrail"), has moved for certification of a defendants' class under Fed. R. Civ. Pro. 23.

For the reasons stated on the record January 7, 1994 (a transcript of which is on file with the Clerk of this Court), this case meets the prerequisites of a class action specified by Fed. Rule Civ. Pro. 23, and a class action is superior to any other method for the fair and efficient adjudication of this controversy.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Conrail's motion for class certification shall be, and is hereby, granted on the following terms:

[2] *ORDER*

1. THIS ACTION IS CERTIFIED AND SHALL BE MAINTAINED AS A DEFENDANTS' CLASS ACTION WHEREIN THE DEFENDANTS' CLASS CONSISTS OF ALL NEW YORK ASSESSING, LEVYING OR COLLECTING JURISDICTIONS IN WHICH CONRAIL HOLDS RAIL TRANSPORTATION PROPERTY SUBJECT TO AD VALOREM TAXATION OR TO WHICH CONRAIL PAYS AD VALOREM TAXES. This certification shall remain in full force and effect pending further orders of this Court. (Defendants, State Board of Equalization and David Gaskell, while proper parties, are not members of the defendants' class.)

2. Class representatives shall consist of all presently-named defendants except the State Board and David Gaskell. Counsel for these class representatives are:

Kenneth Schoetz, Esq.
Erie County Attorney
69 Delaware Ave.
Buffalo, NY 14202
(716) 858-2201
(716) 858-2281 (Fax)

Michael Englert
Attorney for Town of Hyde Park[1]
11 Raymond Avenue
Poughkeepsie, NY 12503
(914) 454-1220
(914) 454-3315 (Fax)

Linda S. Kingsley
Corporation Counsel
City of Binghamton
City Hall
38 Hawley Street
Binghamton, NY 13901
(607) 772-7013
(607) 772-0508 (Fax)

Louis N. Kash
Corporation Counsel
City of Rochester
City Hall
30 Church Street, Room 400A
Rochester, NY 14614
(716) 428-6764
(716) 428-6950 (Fax)

Howard Protter, Esq.
Jacobowitz & Gubitz
Attorneys for Village of Cornwall
158 Orange Avenue
Walden, NY 12586
(914) 778-2121
(914) 778-5173 (Fax)

[1] Counsel for the Town of Hyde Park has advised plaintiff that he is in the process of being replaced by Bernard Kessler, Esq. Route 9 & Kessler Drive, P.O.Box 681, Hyde Park, NY 12538, (914) 229-8888, (914) 229-9926 (Fax). However, at this time no order has been entered providing for such a substitution and Mr. Englert remains attorney of record for the Town of Hyde Park.

James Riley, Esq.
O'Connell & Riley
Attorneys for North Rockland
144 E. Central Avenue
Pearl River, NY 10965
(914) 735-5050
(914) 620-0722 (Fax)

3. Class representatives shall also consist of the following entities which, together with Erie County (already named as a defendant and designated as a class representative), comprise the ten (10) New York taxing jurisdictions to which Conrail is projected to pay the greatest amount of ad valorem tax for the 1993 tax year: City of Buffalo; Onondaga County; Ravena-Coeymans-Selkirk Central School District; Buffalo City School District; Rochester City School District; East Syracuse-Minoa Central School District; Monroe County; Chautauqua County; and Orange County.

[4] 4. Conrail is hereby given leave to file and serve an amended complaint upon the entities listed in paragraph 3 above within ten (10) business days from the date of entry of this Order. (The amended complaint may incorporate by reference the allegations of the original complaint and include such additional allegations as are necessary to join the entities specified in paragraph 3 above.)

5. Within fifteen (15) business days following service of this Order upon the Class Representatives specified herein, any Class Representative may file with this Court papers showing good cause why it should not serve as a Class Representative in this case.

6. Within ten (10) business days from the date of entry of this Order, counsel for Conrail shall serve via United States Mail, postage pre-paid, a copy of this

Order and a Notice of Class Certification in the form attached hereto as Exhibit A upon each New York County in which Conrail operates and upon each New York assessing, levying or collecting jurisdiction to which it pays ad valorem tax.

Dated: White Plains, New York
January 27, 1994

SO ORDERED.

CHARLES BRIEANT
United States District Judge

STATUTE—49 U.S.C. §11503

[1014] * * *

§11503. Tax discrimination against rail transportation property.

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commer-[1015]cial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1445.)

HISTORICAL AND STATUTORY NOTES

Revised Section	Source (U.S.Code)	Source (Statutes at Large)
11503	49:26c	Feb. 4, 1887, ch. 104, 24 Stat. 379, § 28; added Feb. 5, 1976, Pub.L.

Nos. 94-1776; 94-1787; 94-1789

Supreme Court, U.S.
FILED
MAY 12 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

ERIE COUNTY,
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK AND DAVID GASKELL, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE DIVISION OF EQUALIZATION AND ASSESSMENT AND HIS SUCCESSORS IN OFFICE,
Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Dissatisfied with the petitioners' presentation of the questions presented, respondent states the questions as follows:

I. Whether a federal court may determine the true market value of railroad property under U.S.C. §11503 (a statute which forbids states from taxing rail transportation property at discriminatory ratios of assessed value to true market value) based on appraisal methods different from the state's "chosen valuation method?"

II. Whether a federal court may certify a defendants' class under Fed. R. Civ. Pro. 23(b)(3) where the class is comprised of more than 700 taxing jurisdictions (each of which collects property taxes from the same railroad-taxpayer), where the amount of tax in most jurisdictions is based on railroad values fixed by a common state agency, and where the principal dispute involves the true market value of the railroad's property and the validity under federal law of the taxable values determined by the state agency?

LIST OF PARTIES TO THIS PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are four co-defendants who have filed three separate petitions for certiorari: petitioner in No. 94-1776 is North Rockland Central School District ("North Rockland"), a tax levying and collecting jurisdiction within Rockland County, New York; petitioner in No. 94-1787 is Erie County, New York ("Erie County"), a subdivision of the State of New York and a tax levying and collecting jurisdiction; and petitioners in No. 94-1789 are the State Board of Equalization and Assessment of the State of New York, an agency of the State of New York, and David Gaskell, the Executive Director of the Division of Equalization and Assessment (referred to collectively as the "SBEA").

Respondent in all three cases is the plaintiff below, Consolidated Rail Corporation ("Conrail"), a wholly-owned subsidiary of Conrail, Inc., the shares of which are publicly traded. Subsidiaries and affiliates of Conrail, Inc. and Consolidated Rail Corporation that are not wholly-owned are:

Akron & Barberton Belt Railroad Company;
Albany Port Railroad Corporation;
Amtech Logistics Corp.;
Belt Railway Company of Chicago;
Calumet Western Railway Company;
CU Energy Partnership, L.P.;
Indiana Harbor Belt Railroad Company;
Lakefront Dock & Railroad Terminal Company;
Locomotive Management Services;
Nicholas, Fayette & Greenbrier Railroad Company;
Peoria & Pekin Union Railway Company;

Triple Crown Services Company;
TTX Company; and
Railroad Association Insurance, Ltd.

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Nos. 94-1776; 94-1787; 94-1789

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STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK AND DAVID GASKELL, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE DIVISION OF EQUALIZATION AND ASSESSMENT AND HIS SUCCESSORS IN OFFICE,
Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

CONSOLIDATED BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (reprinted in Appendix A to the petitions, pp. A1-A27) is reported at 47 F.3d 473. The oral findings of the United States District Court for the Southern District of New York, dated January 7, 1994 (reprinted in Appendix A to the petitions, pp. A28-A43) are unreported; the preliminary injunction order entered by the district court January 25, 1994 (reprinted in Appendix A to the petitions, pp. A44-A49) is unreported. The order of the district court certifying the defendants' class (reprinted in Appendix A to the petitions, pp. A50-A54) is unreported.

JURISDICTION

The jurisdictional grounds are adequately stated in the petitions. The petitions seek review of an interlocutory order of the Second Circuit affirming the grant of a preliminary injunction and the certification of a defendants' class.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503.

The language of 49 U.S.C. §11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See*, Pub. L. No. 95-473, §3(2), 92 Stat. 1466 (1978); *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 458 n.1 (1987). Section 306 is reprinted in Appendix A to this Brief; the provisions of 49 U.S.C. §11503 are reprinted in Appendix A to the petitions, pp. A55-A57.

COUNTERSTATEMENT OF THE CASE

Dissatisfied with petitioners' respective statements of the case, Conrail adopts as its counterstatement the Second Circuit's description of the case as set forth in Appendix A to the petitions, pp. A1 through A11, and states the following:

1. 49 U.S.C. §11503 and Prior Decisions of This Court Interpreting It.

The federal statute at issue in this case, 49 U.S.C. §11503, prohibits state tax discrimination against interstate rail carriers and declares certain state conduct - such as the discriminatory assessment of rail transportation property for ad valorem tax purposes - an unreasonable burden on interstate commerce. §11503(c) expressly confers jurisdiction on federal district courts to grant such equitable relief as may be necessary to prevent violations of the Act, notwithstanding 28 U.S.C. §1341, the amount in controversy or the citizenship of the parties.

The specific subsection at issue, §11503(b)(1), prohibits a state or its subdivisions from assessing rail transportation property at a higher ratio of assessed value to "true market value" than other commercial and industrial property in the same assessment jurisdiction. As is apparent from the statutory formula prescribed by §11503(b)(1), an unlawful assessment can result from the overvaluation of railroad property relative to its true market value; from the underassessment of other commercial and industrial property relative to its true market value; or from a combination of both factors.

In *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. 454 (1987), this Court reversed a Tenth Circuit decision which held that a railroad could not complain under §11503 of the overvaluation of its property by state officials absent a "strong showing of purposeful overvaluation...with discriminatory intent."[1] This Court ruled that "in order to compare the actual assessment ratios [under §11503(b)(1)], it is necessary to determine what the 'true market values' are." 481 U.S. at 461. This Court rejected the proposition that state-determined values are "not subject to further judicial scrutiny in the federal courts," 481 U.S. at 462, but reserved the issue of whether a railroad may "challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value." 481 U.S. at 464 n.5.[2]

2. The New York Litigation.

In this case, Conrail's real property was subjected to ad valorem tax in New York for the 1993 tax year based on assessed values calculated by the SBEA and certified by the SBEA to local assessors. The SBEA's aggregate assessments of Conrail's New York property for the 1993 tax year exceeded those calculated by the SBEA for 1992 by more than 70%.

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[1] *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, No. 85-1657 (10th Cir. May 2, 1986) slip op at 3, *rev'd*, 481 U.S. 454 (1987).

[2] The only other case to come before this Court under §11503, *Dept. of Rev. of Oregon v. ACF Industries, Inc.*, ____ U.S. ____, 114 S.Ct. 843, 127 L.Ed.2d 165 (1992), involved §11503(b)(4), a subsection not at issue in this case.

In calculating Conrail's assessments, the SBEA used a valuation procedure which the SBEA has described as a "cost approach."[3] In essence, the SBEA estimated the "reproduction cost new less depreciation (RCNLD)" of Conrail's track structure and improvements and the value of Conrail's land. The SBEA then multiplied these cost estimates by a statutorily-prescribed "economic factor"[4] which reduced the SBEA's cost estimates to a "taxable value."[5]

Based on an independent appraisal which considered Conrail's capitalized income, the market value of Conrail's debt and equity securities, and the depreciated historical cost of Conrail's assets, Conrail filed this suit alleging that the "true market value" of its real property in New York was less than half the SBEA's estimate of "taxable value," and that the SBEA's assessments of Conrail's property were discriminatory within the meaning of §11503(b)(1). Conrail sought a preliminary and permanent injunction prohibiting the further assessment, levy or collection of the discriminatory portion of Conrail's 1993 ad valorem taxes.

In its complaint and motion papers, Conrail sought preliminary relief under Fed. R. Civ. Pro. 65(d) against

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[3] Brief For Defendants-Appellants before the Second Circuit, p.6.

[4] New York Real Property Tax Law (RPTL), §489-hh.

[5] The SBEA multiplied Conrail's "taxable value" within each jurisdiction by the SBEA's "state equalization rate" to produce Conrail's "railroad ceiling" - or its maximum assessed value - within each jurisdiction. *See* Affidavit of Peter Mafilios, Nov. 17, 1993, ¶¶19, 20.

the SBEA and all New York assessing, levying or collecting jurisdictions who had used the SBEA's "railroad ceilings" as the basis for taxing Conrail's rail transportation property. In the alternative, Conrail sought certification of a defendants' class (comprised of the more than 700 New York assessing, levying or collecting jurisdictions to which Conrail pays ad valorem tax annually) and requested a preliminary injunction against the class.

Petitioners opposed Conrail's motion for preliminary injunction and moved to dismiss on the ground that the district court had no jurisdiction under §11503 to consider a challenge to the SBEA's "chosen valuation method," and that Conrail was limited merely to challenging errors in the SBEA's "application" of its "chosen valuation method." Petitioners relied on *Chesapeake Western Ry. v. Forst*, 938 F.2d 528, (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1577, 118 L.Ed.2d 220 (1992), in which the Fourth Circuit held that §11503 "does not provide a basis for parties to challenge a State's preferred accounting method." Petitioners (other than the SBEA) also opposed class certification.

The district court below granted Conrail's motion for preliminary injunction,[6] and the Second Circuit affirmed, declining to follow Chesapeake. The Second Circuit stated:

> The *Chesapeake* court viewed the method of appraisal as a matter of state policy that

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[6] The SBEA states in its petition, p.9, that the preliminary injunction was granted "[w]ithout an evidentiary hearing." This is true; but no party requested the opportunity to produce live witnesses and all evidence was submitted on affidavit and counter-affidavit.

> was beyond the reach of the 4-R Act. We do not accept that interpretation of the statute. What the 4-R Act prohibits is discrimination against railroads in the ratios of two sets of numbers: assessed values and true market values of the railroad's property vis-à-vis those of other commercial and industrial properties. To avoid the prohibited discrimination, the SBEA must apply the same valuation standards and methods to the railroad property as are used on the commercial and industrial properties to which it is compared. If the Act were to be interpreted, as defendants would have it, so that the SBEA could adopt a special appraisal method for railroads alone, then the whole nondiscrimination objective of the statute could be circumvented.

47 F.3d at 482; App. A to petitions, pp. A19-20.

The district court also certified a defendants' class (comprised of all New York assessing, levying or collecting jurisdictions to which Conrail pays ad valorem tax) under Fed. R. Civ. Pro. 23(b)(3). Reviewing the certification order under principles of "pendant appellate jurisdiction," the Second Circuit affirmed, holding that the case met each of the criteria of Fed. R. Civ. Pro. 23(a)(1) through (a)(4), and that common issues predominated within the meaning of Rule 23(b)(3).

This case has proceeded through discovery as a class action for more than fifteen months and no class member has opted out. Discovery in this case is virtually

complete, except for the exchange of expert witness reports and the depositions of the parties' experts. This case has also been preliminarily consolidated for trial with a related case involving the 1994 tax year, in which a preliminary injunction has also issued.[7]

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[7] *Consolidated Rail Corporation v. State Board of Equalization and Assessment of the State of New York*, No. 94 Civ. 6764 (CLB), (S.D.N.Y., complaint filed Sept. 16, 1994).

REASONS FOR DENYING THE WRIT

1. The Petitions Seek Review of an Order on Appeal From an Interlocutory Decree.

Generally, this Court will await final judgment in the lower courts before exercising its certiorari jurisdiction irrespective of whether the case meets the criteria of Supreme Court Rule 10.[8] *Virginia Military Institute v. United States*, ____ U.S. _____, 113 S.Ct. 2431, 2432, 124 L.Ed.2d 651 (1993). Under long-established principles, this Court will not review an order of the circuit court on appeal from an interlocutory decree unless certiorari is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 382-385 (1893); *see also, Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *generally*, R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* §4.18, pp. 224-226 (6th Ed. 1986).

The petitions in this case seek review of an interlocutory order of the Second Circuit affirming the

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[8] Although a conflict exists between the Fourth Circuit's decision in *Chesapeake* and the Second Circuit's decision here, no conflict exists between this case and the Ninth Circuit's decision in *Burlington Northern R.R. v. Dept. of Rev.*, 23 F.3d 239 (9th Cir. 1994), despite the SBEA's assertions to the contrary. (SBEA petition, p.18). In *Burlington Northern*, the trial court permitted the railroad to introduce proof of its true market value by "valuation methods" different from those used by the state and rejected certain of the state's appraisal "methods." Although the district court deferred to the state's techniques under Washington's burden of proof rules, it did not circumscribe in any way the railroad's appraisal evidence.

district court's grant of a preliminary injunction and certification of a defendants' class. The decisions of the courts below are based on a partial record and preliminary findings of fact, and are not final. This Court should decline to exercise its jurisdiction to decide the issues presented until it has had the benefit of a full evidentiary record, final findings of fact and conclusions of law by the district court, and final appellate review by the court of appeals.

2. The First Question Presented (Whether A State's "Chosen Valuation Method" Is Subject To Challenge) Is Not Sufficiently "Clear-cut" And Informed By The Record To Warrant Certiorari.

Although certiorari may be granted in an interlocutory case where there exists "an important and clear-cut issue of law that is fundamental to the further conduct of the case," *Randolph Central School District v. Alrich*, ___ U.S. _____, 113 S. Ct. 440, 121 L.Ed.2d 359 (1992); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), this is not such a case. The first question presented, while simply stated, is not sufficiently "clear-cut" for this Court to make a studied and informed decision at this stage of the proceedings.

In *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. 454 (1987), this Court held unequivocally that federal courts have jurisdiction under §11503 to determine railroad valuation issues. This case presents the narrower question of whether such jurisdiction is somehow limited by a state's choice of railroad valuation "methods." If certiorari is granted, petitioners will no doubt endorse a restrictive interpretation of federal jurisdiction along the lines of

Chesapeake, notwithstanding Congress' objectives and the absence of any language in §11503 which circumscribes the federal courts' power to determine "true market value." Conrail, by contrast, will advocate a plain-language interpretation of §11503 which allows railroads to establish the "true market value" of their property by any valuation technique consistent with generally-accepted appraisal principles.

To evaluate the parties' arguments regarding the proper construction of §11503(b)(1), this Court should have a clear picture of the purpose and financial theory underlying the competing "methodologies" involved in this case, and of the full economic and practical consequences of foreclosing federal judicial scrutiny of a state's "chosen valuation method." The continued efficacy of §11503 as an anti-discrimination measure may depend on this Court's construction, and this Court should not undertake the analysis without a solid legal and factual predicate.

At this preliminary stage of the proceedings, there are a number of legal and factual disputes and positional uncertainties bearing on the question presented, the existence of which argues forcefully against a grant of certiorari. These include:

a. What is the reach of the jurisdictional rule advocated by the petitioners? If certiorari is granted, petitioners apparently will urge upon this Court a variant of the *Chesapeake* rule, which precludes federal judicial scrutiny of a state's "chosen valuation method" but permits a railroad to challenge the state's "application" of its method. 938 F.2d at 531. However, no lower court has yet defined what constitutes "methodology" or what

constitutes "application" of methodology.[9] In the context of this case, the SBEA has not yet defined what it means by its "chosen valuation method," nor defined what it means by "application." While the basic steps of the SBEA's railroad appraisal procedure are well known, it is not clear which specific steps the SBEA regards as sacrosanct and which steps are subject to challenge.[10]

For example, one of the steps in the SBEA's appraisal procedure involves calculation of an "economic factor," by which the SBEA reduces its estimate of the railroad's "reproduction cost new less depreciation" to a "taxable value." Conrail's experts have attacked the economic factor as an arbitrary adjustment that is utterly meaningless from a market value perspective. Is Conrail permitted to challenge the SBEA's economic factor under the "application" exception to the *Chesapeake* rule, or is Conrail foreclosed from *any* challenge to the SBEA's economic factor because it represents the state's "chosen valuation method?"

Because there has been no trial, the parameters of the restrictive rule endorsed by petitioners in theory have not been defined in practice, nor subjected to lower court consideration. Without a full factual record, it is

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[9] The Seventh Circuit has described the distinction between "methodology" and "application of methodology" as "ephemeral." *Burlington Northern R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990).

[10] It is not sufficient for the SBEA to claim that *every* step in its process of calculating railroad ceilings is "methodology" immune from challenge. If adopted, such an interpretation would gut *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, and require the federal court merely to accept the state's appraised value.

impossible for any appellate court to determine where the line between "methodology" and "application" should be drawn or, for that matter, whether it can or should be drawn at all.

b. What is the purpose of the valuation procedure to which the SBEA would require federal courts to defer? The SBEA itself has taken contradictory positions on this issue: on the one hand the SBEA asserts that its valuation procedures are designed to calculate a "partial exemption" known as the "railroad ceiling," *not* to "value railroad property for purposes of a property tax."[11] On the other hand, the SBEA asserts that its railroad ceilings are "established by using a standard method of valuation chosen by the state legislature known as the cost approach."[12]

Although the SBEA's "railroad ceilings" are indisputably used by local assessors as the basis for railroad taxes in the vast majority of New York assessing jurisdictions, the SBEA's "railroad ceilings" are not based on "true market value" estimates, nor were they designed to be. If the SBEA's method is *not* intended to reflect or estimate "true market value," it will do so only by coincidence.

It must be emphasized that *no* witness for the SBEA (or any other defendant) has yet testified that the values calculated for Conrail's property by the SBEA represent "true market value." Although the SBEA asserts

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[11] Brief of Defendants-Appellants before the Second Circuit, p.6.

[12] *Ibid.*

in its petition, p.8, that "the SBEA calculated the true market value of Conrail's property for 1993 as $974 million," no one from the SBEA has testified that $974 million was a "true market value" estimate for Conrail's realty, or that $974 million was intended to represent "true market value." Indeed, the SBEA employee who calculated the number expressly disavowed on deposition any opinion that $974 million represents "true market value" and described the number instead as, "[T]he resulting number after applying the economic factor to the estimated reproduction cost. I would not call it a true market value."[13]

Thus, this Court should not be asked to foreclose federal judicial scrutiny of the SBEA's valuation procedures until discovery and trial are complete and this Court knows the real purpose of the SBEA's procedures.

c. Do the SBEA's valuation procedures comport with normal railroad appraisal principles, such that reasonably knowledgeable persons would regard the result as an indicator of "true market value"? No lower court has ever decided whether, under the *Chesapeake* rule, a state's methodology must bear some relationship to generally accepted appraisal principles in order to be immune from challenge.[14] Although the SBEA asserts

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[13] Deposition of Peter Mafilios, Aug. 2, 1994, pp. 100-102.

[14] In Conrail's view, even if *Chesapeake* is correct, the methodology chosen by the state must at the very least be capable of determining true market value if correctly applied. If the state does not even attempt to determine true market value, but rather applies a mechanistic formula that was never designed to produce an indicator of true market value, railroads *must* be able to challenge that formula in court.

that its valuation procedures are consistent with normal appraisal principles,[13] its valuation procedures indisputably resulted in a 70% increase in Conrail's assessments in a single year without any significant change in Conrail's inventory of property in New York during the year. If the SBEA's valuation procedures produced the correct market value in 1992, how can they produce a number 70% higher in 1993 and still be correct?[14]

Conrail's experts have also described the SBEA's procedures as disconnected from market value and economically arbitrary. Since the courts below have addressed this issue in only preliminary fashion, Conrail respectfully submits that this Court should have the benefit of a full evidentiary record and the analysis of the lower courts before deciding it.

d. What are the requirements of New York law with respect to the valuation of railroad property? Petitioners make much of the requirements of New York law regarding the valuation of railroad real property and

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[13] Brief of Defendants-Appellants before the Second Circuit, p.6.

[14] The SBEA asserts in its petition, p.10, that the district court "implicitly affirmed the correctness of the state's chosen valuation method" by basing its 1993 injunction on the SBEA's 1992 railroad ceilings for Conrail. This is incorrect for two reasons: (1) the district court's injunction was plainly intended to enjoin the tax windfall to local jurisdictions resulting from the 70% increase in Conrail's assessments between 1992 and 1993, not to "affirm" any method; and (2) the SBEA's valuation method changed between 1992 and 1993. Which "chosen valuation method" did the district court "implicitly affirm": the SBEA's 1992 method, or the 1993 method which produced a 70% increase in assessed value?

assert that New York law "prohibits the use of the 'unitary method' as well as a capitalization and stock and debt approach to value." (SBEA petition, p.11.) Although Conrail denies the state's methods are controlling under §11503, Conrail also disputes the petitioners' characterization of New York law.

Before establishment of New York's "railroad ceiling" procedure in 1961, reproduction cost was presumed to be the upper limit of taxable value for railroad realty. *People ex rel. Lyford v. Allen*, 286 App. Div. 621, 146 N.Y.S. 186, 188 (1955). Other evidence of value was admissible, however, to establish a lower value. *Lyford; People ex rel. Lehigh Valley Ry. v. Harris,* 168 Misc. 685, 6 N.Y.S.2d 794 (Sup. Ct. 1938); *People ex rel. New York Central R.R. v. Thompson*, 156 Misc. 536, 282 N.Y.S. 269 (Sup. Ct. 1935). Although reproduction cost was incorporated into the "railroad ceiling" procedure, this procedure was designed to fix tax limits and does not purport to estimate "true market value." Because of the existence of the railroad ceiling procedure, the "permissible approaches" to valuing railroad real property from a market value perspective have not been examined by New York courts for more than 30 years. (The seminal "specialty property" cases in New York which approve of reproduction cost, *e.g., Matter of Brooklyn Union Gas*, 65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985) do not involve railroads.)

Contrary to the SBEA's assertions, certain aspects of New York's current "railroad ceiling" procedure *do* incorporate "unitary" concepts, such as the SBEA's use of uniform data for estimating the cost of track structure throughout the state and the SBEA's use of system-wide earnings to calculate the "economic factor." Furthermore,

in its own public documents, the SBEA has described its current system as "duplicative, poorly understood, and fragmented," and has strongly endorsed a unitary approach to valuing railroad property.[15]

All of the foregoing legal and factual subissues underscore the practical and semantical difficulty of crafting a jurisdictional rule based on perceived distinctions between "method" and "application of method" and argue against certiorari at this time.

3. With Regard to the Issue of Class Certification, No Conflict Exists Among the Circuit Courts, or Between the Decisions Below and the Decisions of This Court.

Two petitioners, Erie County and North Rockland, argue that the Second Circuit "erred" in affirming the district court's decision to certify a defendants' class under Fed. R. Civ. Pro. 23(b)(3). However, these petitioners merely reargue the merits of the district court's certification order and cite no conflict among the circuits with respect to the appropriateness of a defendants' class under Fed. R. Civ. P. 23(b)(3).

The class certification issue is not appropriate for certiorari because there is *no* disagreement among the federal courts (or even the commentators) that a defendants' class may be certified under Rule 23(b)(3). *See, e.g. Newberg on Class Actions*, Vol. 1, §4.66 (3d ed. 1992) and the cases cited therein. While some courts and commentators have argued that Rule 23(b)(2) does not allow certification of a defendants' class, no

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[15] SBEA *Survey of Railroad and Utility Taxation Among the States*, December 1993.

similar controversy surrounds Rule 23(b)(3). *See, e.g.*, 7A C. Wright, A. Miller and M. Cane, *Federal Practice and Procedure*, §1775 (2d ed. 1986); *Newberg on Class Actions*, Vol. 1, §4.65 (3d ed. 1992). Thus, Erie County's citation of a Rule 23(b)(2) case for the proposition that the lower courts are "confused," *Hanson v. East Lincoln Township*, 814 F.2d 410 (7th Cir. 1987), *proceedings deferred*, 484 U.S. 1001 (1987), is simply inapposite.

Petitioners argue that New York assessing jurisdictions "[act] independently in fixing the assessed values of Conrail's taxable properties within [their] boundaries" and that the district court erred in identifying questions of law and fact which are common to the members of the class and which predominate. (Erie County petition, p.21.) However, the district court specifically rejected petitioners' factual premise and held that the vast majority of New York's assessing jurisdictions actually tax Conrail's property on the basis of taxable values fixed by the SBEA, not by local assessors. Thus, although petitioners continue to dispute the facts, they present no legal issue worthy of certiorari.

4. The Second Issue Raised By The SBEA (Whether §11503 Requires A State To Apply The Same Method Of Valuing Commercial and Industrial Property As It Uses For Railroads) Meets None Of The Criteria Of Supreme Court Rule 10.

The SBEA presents the question of whether §11503 "require[s] a state to apply the same method of valuing other commercial and industrial property as it applies to rail transportation property." (SBEA petition, p.i.) This is not an issue insofar as Conrail is concerned,

and is based on a misreading of the Second Circuit's opinion.

The Second Circuit's decision does not "require" states to value *commercial and industrial* property in any particular manner. The Second Circuit merely observes that, if cost, market and income approaches are used for commercial and industrial properties to estimate market value, those approaches should also be considered for railroad properties. The Second Circuit does *not* reverse the §11503 equation as petitioners suggest, nor require states to treat commercial and industrial properties in the same way railroads are treated. As in all §11503 cases, New York remains free to tax its citizens in any form it chooses, so long as it does not tax the *railroad industry* in a discriminatory manner.

Thus, the SBEA's second question presented is a non-issue which merits no consideration by this Court.

5. The SBEA's Third Issue (Whether §11503 Requires A Sales Assessment Ratio Study) Meets None Of The Criteria Of Supreme Court Rule 10.

The SBEA argues that the lower courts erred by accepting Conrail's preliminary statistical evidence regarding the "ratio of assessed value to true market value" of other commercial and industrial property. The SBEA asserts that §11503(c) "requires" proof by a "random sampling method known as a sales assessment ratio study," and that Conrail's evidence was not a *sales* assessment ratio study. (SBEA petition, pp. 24-26.)

The SBEA cites no conflict among the decisions of the lower courts on this evidentiary issue because none

exists. The lower courts have long recognized that, while §11503(c) expresses an evidentiary preference for the results of a sales assessment ratio study, courts have wide discretion to consider other evidence. *See, e.g., Clinchfield R.R. v. Lynch,* 784 F.2d 545, 554 (4th Cir. 1986) (personal property studies); *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446, 451 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (10th Cir. 1981) (appraisals of public utilities).

The SBEA's real complaint is that the district court accepted Conrail's statistical evidence, particularly Conrail's calculation of the state-wide average level of assessment for commercial and industrial property (which was based on the SBEA's own data). It must be emphasized, however, that Conrail also introduced preliminary evidence of pervasive discrimination on a jurisdiction-by-jurisdiction basis (also using the SBEA's commercial and industrial data and estimation procedures). Furthermore, at the trial of this case, Conrail intends to introduce *sales* assessment ratio study analyses of unlawful discrimination on a jurisdiction-by-jurisdiction basis.

Thus, as the Second Circuit has already held, the district court did not abuse its discretion in accepting Conrail's preliminary statistical proof of the level of assessment of other commercial and industrial property, and the SBEA has presented no ground for certiorari on this issue.

6. No Special Or Important Reasons Exist For Granting The Writ.

Petitioners argue this case is important because the decision below has an "impact on the comity between the

federal courts and state governments that is essential to the principles of federalism," and the preliminary injunction has "affected virtually every local municipal budget in New York State."[16] (SBEA petition, p. 27; Erie County petition, p. 25.)

As this Court noted in *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 14 n. 10 (1983), impairment and disruption of state finances are inevitable consequences of congressional regulation of state taxation. As this Court specifically held in *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. at 464, comity and disruption to local finances are irrelevant considerations in §11503 cases. *See also*, *Southern Ry. v. State Board of Equalization*, 715 F.2d 522, 523 n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Conrail's property in New York comprises less than 1% of the taxable value in the vast majority of New York assessing jurisdictions in which it operates. If a portion of those taxes is unlawfully exacted, it cannot be collected, irrespective of good purposes for which it might be used.

7. The Cost Savings Predicted If Certiorari Is Granted Are Unlikely.

Petitioners assert that immediate review is necessary to furnish guidance on the further conduct of the case and to aid them in the selection of valuation experts. Petitioners argue that, if this Court grants certiorari and forecloses federal judicial scrutiny of the

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[16] This is hyperbole; Conrail operates in less than one-third of the municipal districts of the state leaving more than two-thirds unaffected by this litigation.

state's "chosen valuation method," petitioners will be spared the expense of retaining valuation experts to rebut the appraisals of Conrail's experts. (SBEA petition, p.29; Erie County petition, p.25.)

This argument presupposes that, if this Court endorses petitioners' restrictive rule, Conrail's overvaluation claim will disappear and obviate the necessity for *any* valuation experts. This will not happen.[17] Although a successful petition by the defendants might result in fewer factual issues to be tried, the remaining valuation issues will be substantial and complex, and valuation experts will still be necessary on both sides. Thus, the economies petitioners predict are chimerical.

The real issue raised by this case is what factors and evidence of "true market value" may the district court consider in determining the "true market value" of railroad property. Even the restrictive *Chesapeake* rule recognizes that railroads are entitled to produce "independent evidence" of their true market value, provided the railroad "limits its evidence to factors that may properly be taken into account under the State's chosen methodology." *Richmond Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (explaining *Chesapeake*). Thus, Conrail intends to introduce expert evidence at trial regarding the SBEA's "misapplication" of its own methodology so there will be sufficient facts on the record for an appellate court to review the trial court's decision

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[17] Unless this Court reverses *Burlington Northern R.R. v. Oklahoma Tax Comm'n.* and holds that overvaluation claims are not legally cognizable under §11503, Conrail will be litigating its true market value in federal court.

on appeal even if this Court eventually decides that *Chesapeake* is correct. Since the SBEA and the other petitioners will likely reject Conrail's expert testimony on "misapplication" issues and rely on expert witnesses of their own, the petitioners will have to pay valuation experts regardless of the legal framework within which they testify.

It must be emphasized that petitioners have already engaged valuation experts familiar with the case. In opposing Conrail's application for preliminary injunction in the 1994 case, petitioners tendered expert witnesses who use many of the same railroad valuation techniques advocated by Conrail's experts. Some of these same petitioners' experts have also assisted petitioners' counsel in planning and conducting documentary discovery in this case. Thus, petitioners have already retained experts who have performed substantial work on this case and, in seeking certiorari, petitioners simply hope to avoid paying some of these experts for preparing "true market value" appraisals. While such cost savings may be of practical importance to the litigants, they are no reason for granting certiorari. *See, e.g., Ticor Title Insurance Co. v. Brown*, ___ U.S. ____, 114 S. Ct. 1359, 1362, 128 L.Ed.2d 33 (1994).

CONCLUSION

Although 49 U.S.C. §11503 is important legislation, the principal issue presented by the petitions raises numerous subsidiary issues of law, of fact, and of judgment that should be analyzed within the context of a full record, including final analysis by the courts below. Denial of the petitions at this stage of the proceedings does not preclude petitioners from raising these same issues in a later petition after final judgment. The petitions should, therefore, be denied.

Respectfully Submitted,

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APPENDIX A

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Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for the purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that--

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial

property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term-

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes

or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.